United States Court of Appeals

for the Second Circuit

APPENDIX

75-7600

United States Court of Appeals

For the Second Circuit

B

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

against

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

JOINT APPENDIX

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UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM	
vs.	Before: HON. MORRIS E. LASKER, District Judge.
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL	

New York, December 11, 1973

STENOGRAPHER'S MINUTES

Columbia Broadcasting System

vs. 69 Civ. 5740

American Society of Composers, Authors and Publishers, et al.

New York, New York.
December 11, 1973 -
10:00 A.M.

(Trial resumed.)

THE COURT: Mr. Topkis?

MR. TOPKIS: If your Honor please, with the exception of the conclusion of Mr. Nathan's testimony, we have no other live witnesses whom we wish to call.

THE COURT: Is the implication that you have some dead ones?

MR. TOPKIS: Depends how you feel about depositions. Congealed, possibly.

THE COURT: I take it that Mr. Rubin is not being called.

MR. TOPKIS: Rubin is not being called. We do have a number of depositions to offer. We have documents as to which our friends have some objections. I would imagine we can handle that at another time because I understand Miss Kearse has a couple of live witnesses wait-

ing.

THE COURT: I think live witnesses always have preference.

MR. TOPKIS: Subject to that, your Honor, ASCAP at this point rests.

THE COURT: Before the day is out we will arrange at what time we will go to the documents.

Miss Kearse?

MISS KEARSE: Mr. Edward Cramer, please.

E D W A R D C R A M E R, called as a witness on behalf of BMI, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MISS KEARSE:

Q Mr. Cramer, by whom are you employed?

A Broadcast Music, Incorporated. BMI.

Q What is your position?

A I am president and chief executive officer.

Q Are you also a director of BMI?

A Yes, I am.

Q How long have you held that position?

A Since March 31, 1968.

Q Would you please outline for us your educational and professional experience?

A I graduated from Columbia College, from Cornell Law School and then I was a teaching fellow at NYU School of Law, 1950-1951.

I had an advanced degree from New York University School of Law in 1953, with specialization in copyright, trademark and trade registrations.

I became associated in 1951 with the law firm then known as Rosenman, Goldmark, Colin & Kaye. I remained there until about 1960, at which time I left to form my own firm which became known as Cramer & Hoffinger, and I remained in private practice until I joined BMI in March, 1968.

Q During the years in which you were practising law, did you gain some familiarity with the business of BMI?

A Yes. While I was associated at the Rosenman firm I worked on a number of matters that BMI was then involved with. There were private anitmust litigations, there were Government investigations, legislative hearings, and before I left I was pretty much involved with most things that involved that particular client, although I may not have worked on every matter -- I was fairly well informed.

And then, when I left to form my own firm I

was retained as special counsel to BMI.

I was special counsel to them in the Government antitrust proceeding, I did most of their legislative work and whatever the then president of the company wanted me to do. That is what I did.

Q After you left the Rosenman firm, did you represent any music publishers or writers?

A Yes. I represented a number of publishers and writers, not in their dealings with BMI but I did, yes.

Q Since becoming president of BMI, have you had contacts with music publishers and writers?

A Oh, yes. Many publishers and writers, yes.

Q Mr. Cramer, will you tell us please how BMI is organized?

A It is a stock corporation organized under the laws of the State of New York.

There are currently about, roughly, about 500 stockholders all of whom are or were broadcasting stations.

They were the original holders of the stock that was issued in 1940-1941.

THE COURT: I've noticed, of course, some of the--not some--the plaintiff here for example, CBS, was an original stockholder as I understand it and some of the networks and I gather that they gave back stock or whatever.

What I wanted to know is are you saying that except for those who have given up their stock, the stockholders are now still the original stockholders?

THE WITNESS: Basically, that's correct, your Honor. The networks divested themselves of their stock in or around 1958 and occasionally other stations will turn in their stock when the station is sold.

We have not issued any new stock since 1940-41, so that the stations either are the former--are the original stockholders or their successors in interest.

THE COURT: I assume there are some restrictions on the transfer of the stock?

THE WITNESS: There are. Basically, to broadcast licenses.

THE COURT: And the stock as I understand it does not yield any economic benefit, is that correct?

THE WITNESS: None whatsoever. The company, in its original prospectus, it was noted that there was no anticipation of a dividend at any time and in the 33 or 34 years of operation it has never declared a dividend.

THE COURT: Thank you.

Q Mr. Cramer, who sits on the BMI Board of Directors?

A There is about 15 members who are presently or were employees of various stockholder broadcasting stations plus two of us who are not--who are in effect management personnel.

Q And that would be yourself and who else?

A And Sidney Kaye, who is now Chairman of the Board and who is a member of the law firm of Rosenman, Colin, Kaye, et cetera.

Q Are there any music writers on the Board of BMI?

A No.

Q Are there any music publishers on the Board of BMI?

A No.

Q Does BMI have an executive committee?

A Yes it does. Five members of the Board of Directors are selected by the Board to serve as an executive committee.

Q Does BMI have a writers committee?

A No.

Q How about a publishers committee?

A No.

Q Can you tell us how many compositions there are in the BMI repertoire?

A I could only give you a rough estimate because it constantly changes.

I would say roughly around a million compositions.

Q Is there a list of performed compositions?

A There was a list of performed compositions that was prepared, I don't know, maybe ten years ago but we don't have a current list of performed compositions, no.

Q Mr. Cramer, what categories of music users have BMI licenses?

A Well, we have broadcast licensees that includes radio and television stations. Networks. We have then the broad category that we call general licenses and they include hotels, nightclubs, ballrooms, background services such as Seeburg, Muzak, 3M and other dependent background suppliers. Roller skating rinks. Sports arenas.

THE COURT: They are all within the general category?

THE WITNESS: General licenses, yes. We try to divide them into the broadcast on one side and general licenses on the other.

THE COURT: And in effect the general license is everything that isn't a broadcast license?

THE WITNESS: Yes, we used to call it a non-broadcast license but that was discriminatory and we changed it.

Q What types of licenses does BMI offer to broadcasters?

A We offer them a blanket license and per program license.

Q Can you tell us whether broadcasters have chosen more of one kind of license than the other?

A Yes. Overwhelmingly the broadcasters have chosen a blanket license. We have about 7,000 broadcast licenses and maybe a half dozen--those are blanket licenses. Maybe half a dozen are per program licenses.

Q When did BMI first grant a license to a television network?

A Sometime in the early fifties. I don't know the exact year. Around 1950, I think. But it may be '54. I am just a little hazy at the moment.

Q To which television network did BMI grant licenses?

A To the then--all three of the networks that were then operating. NBC, ABC and CBS.

Q Was the same type of license granted to each of these networks?

A All the licenses were identical.

Q What kind of licenses were they?

A Blanket licenses.

Q Has any television network had any license other than a blanket license since you first started granting licenses to television networks?

A No.

Q Does NBC television network and does ABC television network have a license from BMI now?

A Yes.

Q Is that a blanket license?

A Yes.

Q Does CBS radio network have a BMI license?

A It does.

Q What kind of license is that?

A It has a network per program license.

THE COURT: CBS Radio?

THE WITNESS: That's correct.

THE COURT: Is that since they went to--it's only CBS New York, I guess. It is all news--

MR. MRUSKA: The entire radio network now is all news.

THE COURT: Has the per program license been used by the CBS Radio Network only since it went to all news or was it used before that too?

THE WITNESS: Before that, your Honor.

THE COURT: Thank you.

MISS KEARSE: Your Honor, I would like to have the clerk mark this document BX 101.

(BX 101 marked for identification.)

Q Mr. Cramer, let me show you BX 101 and ask you if you can identify it?

MR. HRUSKA: Your Honor, for the record I would like to object to questions regarding this document, the introduction of this document. I don't think that the manner of licensing chosen by the radio network is relevant to the case.

Obviously the radio network, particularly since the advent of national commercial television networks, is a far different thing in terms of its programming practices than the radio networks were in the 1940's.

THE COURT: It may not be offered but on the assumption it will be I will allow it bearing in mind your remarks relating to the weight of the evidence.

MISS KEARSE: I do so offer it. I am not sure Mr. Cramer has actually identified it.

THE COURT: I don't know that he has identified it. Mr. Hruska has.

Mr. Cramer, do you care to affirm or deny Mr.

Hruska's identification?

THE WITNESS: This is the agreement that was--this is the agreement between BMI and it--and CBS for the radio network.

Q When was that entered into?

A March 11, 1959.

THE COURT: The licensing?

THE WITNESS: Yes.

THE COURT: March 11, '59?

THE WITNESS: Yes, sir.

THE COURT: Mr. Topkis, do you have any objection to its introduction?

MR. TOPKIS: Miss Kearse and I have a non-aggresion pact.

THE COURT: Received in evidence.

xx (Defendant's Exhibit BX 101 is received in evidence.

Q Mr. Cramer, how are royalty rates arrived at for the licenses which BMI grants?

A They are arrived at through negotiating, usually with industry representatives where there are associations that represent the industry.

For example, in the radio industry there is a special committee that is designated to negotiate contract

with performing rights organizations. They negotiated two radio contracts as a matter of fact with representatives of the Industry Committee.

I negotiated the television contract with representatives of the Television Industry, that is, the television station contracts with representatives of the television industry and the hotel contract, where there is a hotel trade association, was negotiated with representatives of that association.

Where there is no association, we generally try to get together a number of important people in the industry to talk to them about the contract, so it is generally done on that kind of basis.

Q How would you compare the television networks with, say, the radio stations in terms of amount of music used?

MR. BRUSKA: I object, your Honor. I don't believe a proper foundation has been laid for that question and it really is very difficult to conceive how Mr. Cramer could really answer it.

THE COURT: Maybe he can but I think you really ought to ask him first whether he has given any thought to the question and I would like to know what the background of any opinion he might express would be.

Q Mr. Cramer, does BMI in any way survey the music used by its various licensees?

A Yes.

Q How does it do that?

A With the networks we get what purport to be complete logs from the networks as to what is played so we can count those. On local stations, take radio stations, for example, we sample the stations and the stations that are part of the sample submit logs to independent auditors, Ernst & Ernst, and after the period is over those logs are sent to BMI for identification and the music is then identified and the sample is projected.

I can go into more detail but basically we use a sample system for local broadcasts and we do a census for the networks.

Q Based on the sampling that BMI does and the reports that BMI received, do you feel that you have an understanding as to the various levels of music usage by the BMI licensees?

A Yes. I have examined those logs and station reports from time to time for many years.

Q How would you compare television networks and radio stations in terms of music usage?

A Well, a radio station, for example, uses a lot more music than a television network would use. Let me do a little arithmetic in my head.

A radio station might use maybe 15 to 20 songs

an hour but the audience could be very small. A 100 watt station could be on the air 20 to 24 hours a day and play 15 to 20 songs an hour, but it may have an audience of maybe 5000.

A television station could use maybe, in some instances, a network might use only 10 or 12 or 20 a day, but you multiply that, say a network of 200, 250 stations times a very substantial audience so the individual composition use is greater, stations, the audience is much greater, obviously, on network.

MR. HRUSKA: Your Honor, I move to strike the testimony on the ground that the kinds of estimates which Mr. Cramer has just proffered are entitled to so little weight they are not even relevant. To come up with a statistic like so many uses a day for a radio station, presumeably an average radio station, a statistic or a television station, that is obviously a rather enormous job of data analysis and I don't think that the foundation was laid to indicate that Mr.Cramer has made such an analysis.

THE COURT: I don't think I can regard what Mr. Cramer has just stated as being, or even purporting to be a scientific study of the situation, but I do think that he has indicated competence to give me the broad outlines

of the picture, namely, that radio stations, and I think I could almost take judicial notice of the fact, do use on the whole a great deal more music than the average TV network.

That there are many small radio stations and that the networks have large audiences and those are the only facts it seems to me she is trying to establish.

All right, Miss Kearse.

Q Mr. Cramer, Donald Sipes testified in this trial that in 1969 there were negotiations between BMI and CBS with respect to a license for CTN.

Will you tell us how those negotiations between BMI and CBS came about in 1969?

A At that time I had just concluded a new contract with the radio industry. I commenced discussions with representatives of the television industry toward a new contract. We had gotten an increase for radio. We were going to hopefully get an increase for television and we were then also considering what we were going to do in other areas because we felt that our use of music had increased, so we were anticipating approaching the networks but the immediate cause was, when I learned in April 1969 that CBS had just entered into a new contract with ASCAP, it was at that point that I took the initiative and called

Mr. Robert Evans, general counsel, I think that is his title, general counsel for CBS, and told him that in view of their new agreement for the future and the settlement that they had made for the past with ASCAP, I wanted to negotiate a new contract with him, both for the future and to see if we couldn't clean up the past.

THE COURT: I don't understand what you mean by "cleaning up the past."

THE WITNESS: Well, your Honor, both ASCAP and BMI have contracts -- had contracts with CBS which were in my judgment substantially identical except for the rate.

THE COURT: this is prior to 1970, you mean?

THE WITNESS: Yes. They were substantially identical except for the rate. In April '69 there was a settlement made betweenCBS and ASCAP relating to the past. Many millions of dollars were paid.

THE COURT: I think you said that you had heard that in April of '69 they entered into a new contract. Did youmean the settlement agreement or did you mean the prospective contract?

THE WITNESS: It was both. Two elements were involved in that. One was a settlement of the past coupled with a contract for the balance of that year.

THE COURT: And you wanted to accomplish the same

thing?

THE WITNESS: Exactly true. So I called Bob Evans, general counsel, whom I knew and said, "Okay, now when do we start negotiating ours?"

And he said to me, "Well, you are going to have a good year but I am not the guy to negotiate with. Call Donald Sipes."

So I did.

THE COURT: The rest is history? Is that what you mean?

MISS KEARSE: Yes, hopefully it is not all finished yet.

Q Did you meet with Mr. Sipes?

A Yes. I had many meetings with Mr. Sipes but -- yes, I did.

Q When was your first meeting with him in 1969?

A Early May, 1969.

Q Did anybody else attend for CBS?

A Yes. At that first meeting I believe that Mr. Appel attended and I don't know if anyone else was there at that time. I can't remember because there were many meetings over the course of time but I remember Mr. Appel being present at least at the first meeting, yes.

THE COURT: For the record, you should indicate

counsel to CBS.

Q Did anyone else attend any of those meetings for BMI?

A In the year 1969, one of the early meetings I had with Jerome Shapiro, a member of the firm of Hughes, Hubbard & Reed.

THE COURT: Was he there from time to time you mean?

THE WITNESS: No, just at one meeting.

THE COURT: Okay.

A I believe, though, that I attended most of the other meetings in that year, in the year '69 alone. Except the one meeting where Jerry Shapiro was with me.

Q Now, you say you met with Mr. Sipes a number of times. Can you tell us, please, in as nearly chronological order as you can in words or in substance what you said to Mr. Sipes and what Mr. Sipes said to you?

A Am I limiting myself then to the year '69?

Q Yes. My question relates to 1969.

A In all those discussions, there were two basic subject matters. One was our claim for past payment and the other related to a prospective license.

As to the claim for past payment, I made our position fairly clear. I said the contracts are the same, the rates are different. If you owed ASCAP and paid ASCAP X dollars for the past, then it is a simple formula -- one point two over so and so over -- the BMI percentage over the ASCAP percentage, the BMI money over the ASCAP money.

Mr. Sipes said that he could not discuss that. Even though the agreement was made --

THE COURT: You mean he couldn't discuss the subject of past payments at all?

THE WITNESS: At all, because even though an agreement was made and entered into before Judge Ryan on April 9 of that year, CBS had not made any payment and for some reason which I don't understand, didn't make a payment for many months and appeals were taken -- I don't know what was involved -- but they said they would not discuss it.

Mr. Sipes said he would not discuss that subject with me and that was sort of left out.

But then we discussed the question of a new license and I said I would take that up separately or to-

gether. We then discussed many times --

THE COURT: Mr. Hruska?

MR. HRUSKA: I had wanted to move to strike the testimony regarding the discussions between Mr.Cramer and Mr. Sipes concerning the past.

THE COURT: The reasons why?

MR. HRUSKA: Yes.

THE COURT: I will strike the testimony that relates to reasons why CBS allegedly wouldn't discuss it. I think Mr.Cramer certainly is competent to testify and it is certainly binding on CBS that Mr. Sipes said he would not discuss the question of past. I don't know if it is relevant.

MR. HRUSKA: That is the point.

THE COURT: If it is not, it is just background material.

MR. HRUSKA: Obviously, I don't believe it is relevant and I don't want to go to the trouble on rebuttal to bring in Mr. Sipes.

THE COURT: I am not ruling that it is relevant. Are you interested in the question of past payments?

MISS KEARSE: I am interested in bringing out exactly what transpired at any of the meetings.

THE COURT: I think it is always good to have a feeling of what happened, but some may be relevant and some not and at the moment, I don't say --

MISS KEARSE: There was testimony by Mr. Sipes as to his view of what happened at the meetings and I would like to have Mr. Cramer --

THE COURT: In the classic phrase, for whatever it is worth, I will accept the fact that Mr. Sipes said he wouldn't talk about past payments.

Now, let's --

A We then discussed the question of a prospective license for the year 1969 and future years.

We had many discussions about that. I pointed out to him the increased value of our repertoire and that we should get a substantial increase in payment.

THE COURT: How long had it been since the last?

THE WITNESS: 1954 was the last contract. Since that time, BMI had had a remarkable increase in the catalog and I wanted to becompensated for that and to discuss various methods of compensation.

I said, "If you want to use the percantage basis as you have done in the past, we will negotiate a few percentage agreements."

Instead of 1.09, it would be whatever new percentage we would arrive at.

"If you want to negotiate for a fixed dollar amount, I will negotiate for a fixed dollar amount with you."

And, thirdly, I offered on many occasions to submit the entire question of the rate or back payment, either one or the other or both, but including a new rate, to an impartial arbitration and that is what we discussed in terms of -- that was my proposal.

Q And did Mr. Sipes respond to that?

A He said that CBS would not arbitrate. In fact, I even mentioned several arbitrators to him. I remember distinctly talking about the former commissioner of the FCC, Rosel Hyde. He was well-known to Dr.STanton and to me and a man of great integrity and standing in the field.

I believe I suggested Doctor Emeritus Walter Derenberg, but Mr. Sipes said as a matter of corporate policy, whatever that means, they wouldn't arbitrate.

And whenever we started to talk the dollars, he said, "I'll have to go back and talk to my people and I'll let you know.

And nothing ever happened.

There were several meetings like that.

That in very summary form is what took place in these early meetings, up until about October.

Q You testified earlier with respect to your discussions with Mr. Sipes as to past amounts that BMI was claiming.

Did Mr. Sipes actually state to you a reason for CBS's refusal to discuss the past?

MR. HRUSKA: Objection, your Honor. I believe ... not relevant to this case. This is the subject of another lawsuit between --

THE COURT: Sustained at this point. Not because it is the subject of another lawsuit, but I don't understand its relevancy to the issues before me.

Q Mr. Cramer, was there any discussion of per program licenses at your meetings with Mr. Sipes in 1969?

A No.

Q Has BMI ever quoted a per program royalty rate for a television network?

THE COURT: This is per program?

MISS KEARSE: Per program.

THE WITNESS: No. Nobody every asked for one.

Q At your 1969 meetings with CBS, was there any discussion of a per use license?

A Never. Quite the contrary. The subject was limited to blanket licenses and, indeed, we even discussed the blanket licenses because in the April 9, 1969 conference before Judge Ryan, where the new rate was agreed upon and entered on to the record.

THE COURT: For ASCAP?

THE WITNESS: For ASCAP. It was a blanket license and representative spokesmen for CBS at that conference, at that hearing before Judge Ryan, described the great advantage of a license which provided --

MR. BRUSKA: Objection.

THE COURT: I'll sustain an objection to this. It is part of the record and if you want to put it before me, you can. But I don't think it should come from the witness.

MISS KEARSE: The transcript is on record in this court and the Court, of course, can take judicial notice of it.

THE COURT: Right.

MISS KEARSE: But I gather from Mr. Cramer that this was something that was discussed.

THE COURT: Are you saying that it was discussed with Mr. Sipes?

THE WITNESS: Yes, your Honor. We discussed--

THE COURT: Sorry.

THE WITNESS: We discussed the blanket license with Mr. Sipes and we discussed what took place at the hearing before Judge Ryan.

THE COURT: I didn't understand that.

THE WITNESS: I'm sorry I didn't make it clear.

Yes, that was the subject matter of a great deal of discussion because obviously we were discussing--as I said before, it was very difficult to isolate the claim for future, any claim for past. Those were both discussed at the same time.

In all these discussions during those months went back to this basic hearing before Judge Ryan, so that came up repeatedly.

In any event, yes, we did discuss that and we

never discussed anything other than a blanket license. We discussed no per use, no per program; just the blanket license.

THE COURT: Had you ever heard of a per use license before the initiation of this litigation?

THE WITNESS: Not in connection with broadcasting never.

THE COURT: I mean in connection with broadcasting.

THE WITNESS: Never.

Q Mr. Cramer, let me show you a document which has been introduced in evidence as PX 200.

200 has been introduced as a letter dated December 19, 1969, signed by Robert Wood, President of the CBS Television Network.

THE COURT: To BMI?

MISS KEARSE: Addressed to both ASCAP and BMI.

THE COURT: Right.

Q Prior to receiving that letter, Mr. Cramer, had BMI received any requests from CBS for a per use license?

A No.

Q Now, prior to receiving PX 200, what was the status of BMI's negotiations for a new license with CTN?

A Sometime in October, I don't remember the exact

date, we sent a notice of termination of the television license. Either party--

THE COURT: Effective when? January 1st?

THE WITNESS: Yes, January 1st. Either party had a right to terminate, I think, on 60 days notice and when negotiations proved fruitless, I sent a notice of termination to CBS effective as of the end of the year.

Q I would like to ask that this document dated October 29, 1969, be marked BX 166 for identification.

(BX 166 marked for identification.)

Q Mr. Cramer, is BX 166 for identification the letter that you just referred to?

A Yes, it is.

THE COURT: It is the notice of termination?

THE WITNESS: Yes, your Honor.

MISS KEARSE: I offer it in evidence, your Honor.

MR. HRUSKA: No objection.

(BX 166 received in evidence.)

Q Mr. Cramer, after sending BX 166 to CBS, was there another meeting in 1969 with respect to a license for CTN?

A Yes, there was.

Q How did that come about?

A I believe that that was called on the initiative of Mr. Sipes.

Q And who attended that meeting?

A To the best of my recollection, I was there alone on behalf of BMI and I think that Mr. Sipes was accompanied by Mr. Horlik, who was an associate of Mr. Sipes.

Q And will you tell us what you said and what Mr. Sipes or Mr. Horlik said at that meeting?

A We just went over the same ground that I previously testified to and Mr. Sipes said he would get back, for about the tenth time he would talk to his people and he would get back to me.

Q Did he get back to you?

A No.

Q What was your next contact with CBS on this subject?

A When I received a letter dated--I received a letter which is dated December 19, but I believe that letter was not received by me until about two or three days later.

THE COURT: Are you talking about PX 200?

THE WITNESS: It was PX 200.

Q Did BMI respond to PX 200?

A Yes, we did. Immediately.

Q Let me show you a document which is in evidence as PX 202. Is PX 202 BMI's response to PX 200?

A Yes, it is.

Q And that letter is dated what?

A December 23, 1969.

Q Between December 23, 1969 and the end of the year,

did BMI and CBS enter into a new license for CTN?

A No. There was no new license agreement.

THE COURT: There has not been one since, has there?

THE WITNESS: The only agreement is the one we have which is--

THE COURT: The one that's subject to the preliminary injunction?

THE WITNESS: Yes, your Honor.

As a matter of fact--well, sorry.

In fact in that document, which has been marked PX 202, the last sentence, I suggested a telephone call so we could meet to see if we couldn't resolve it in view of the shortness of time between the letter and the end of the year but I never heard from anybody.

Q Mr. Cramer, in your dealings with writers and publishers over the years, have you been able to develop an understanding of what their attitudes are with respect to performance of their music on network television?

A I think so.

Q What is your understanding as to those--

MR. HRUSKA: Objection, your Honor. I don't think the prior answer to the prior question was a proper foundation for this question, which is as broad as the world.

MISS KEARSE: Mr. Cramer has testified, your Honor, that he has had dealings with many writers and publishers since becoming associated with writers and--

THE COURT: If the question is intended to elicit, as I assume it is, that writers and publishers like to have their music played or broadcast, I would be prepared to--I don't know that Mr. Hruska contests that, do you?

MISS KEARSE: Your Honor, we heard for about three days from Mr. Sipes who had never talked to a writer or publisher about his theories they wouldn't deal with him. It seems rather perverted not to hear from somebody who has had a lot of contact--

MR. HRUSKA: On the contrary, your Honor, Mr. Sipes was talking about a matter of business judgment and economics and it is that judgment and--

THE COURT: Do you contest--what is it you offer to prove here, Miss Kearse?

MISS KEARSE: That Mr. Cramer--that writers and publishers like to have their music performed on network television and it is valuable to them in ways other than thro simply earning performance rights and that if CBS were to attempt to deal directly with writers and publishers, they would deal with CBS.

THE COURT: Well, I certainly am prepared to hear

from Mr. Cramer as to the first batch of issues that you raised there. I am somewhat less clear in my mind that he is competent to testify as to what they do if direct dealing was sought, but I am inclined to believe that in this case I have to rely on the testimony of persons who are in responsible positions in the industry and certainly the president and chief executive officer of BMI, who has been in that position for five years and who has been a legal representative of the organization for a period of 15 to 20 years is one of those people.

I will leave it to CBS, I will allow them the opportunity to bring in any publishers, composers, writers they wish to bring in to rebut the testimony I have had so far.

Somewhere I have to get a point of view on this and I think the people who have been put before me, including Mr. Cramer, are responsible sources.

MR. HRUSKA: There is another objection that concerns the stipulation we had with BMI. Your Honor, I believe, is familiar with the substance of that stipulation.

THE COURT: As to the bypass issue?

MR. HRUSKA: Yes, your Honor.

This testimony obviously is being elicited on that issue. It seems to me--

THE COURT: I can't remember whether the terms of the stipulation prevent BMI from putting any further testimony in. I would say to the extent it does not, they would be free to put in testimony but to the extent that the testimony they put in is inconsistent with testimony that's been put in before, I perhaps would have to rule it out. I would be surprised if it is inconsistent with--

MR. HRUSKA: I think the point is whether it is inconsistent or whether it is superfluous in the light of the stipulation or inconsistent with the stipulation. The stipulation says in substance, as I recall it, I don't have the words in front of me right now, my recollection--

THE COURT: Maybe we should look at the words of the stipulation.

MR. HRUSKA: The operative part of it is in paragraph 2. It says any judicial determination made in this action concerning, A, the practicability or impracticability of plaintiff or the suppliers of CTN programming obtaining directly from ASCAP members public performance rights to music in the ASCAP repertoire for any sum or all of such program, or B, the extent to which those rates not practicably obtainable directly from ASCAP members are essential to plaintiff in order to enable it to compete with other television networks shall also be deemed a determination with

respect to and shall also be binding on the parties represented by the undersigned--those are BMI and CBS--in respect of, and then it repeats the same A and B.

THE COURT: I frankly don't read that passage to prevent BMI from putting in evidence on the question. It apparently would bind the Court if the Court was willing to be bound, which it is, to a common determination on the question for BMI and ASCAP and the only question that might arise it seems to me is if the testimony which is elicited is inconsistent with what I might find vis-a-vis ASCAP and if that is the case -- if that should be the case, I would have to decide how to handle it at the time.

MR. HRUSKA: May I just state for the record, your Honor, that I believe that the effect of this stipulation -- under this stipulation if Mr. Cramer's testimony goes to attitudes of BMI affiliates, publishers and writers, then under this stipulation it is irrelevant, superfluous and I think precluded.

On the other hand, if his testimony were to go to the attitudes of ASCAP writers and publishers, that might be relevant if Mr.Cramer was a sufficient expert regarding the attitudes of ASCAP writers and publishers to make the testimony.

THE COURT: He may testify in general about the attitudes of composers and publishers in such a way that what he says I might consider to be applicable to ASCAP

members as well as BMI members.

Let's proceed.

Q Let me withdraw my earlier question and ask you some preliminary questions.

Are there BMI publishers which have subsidiaries or corporate affiliates which are members of ASCAP?

A Oh, yes.

Q Can you quantify that for us?

A Most leading publishers have affiliation with both ASCAP and BMI. It is hard to think of one that doesn't have publishing interests in both camps.

Q When you had contacts with or represented writers and publishers when you were practicing law, were these only BMI writers and publishers?

A I think I represented more ASCAP interests than I did BMI interests at that time.

Q Now let me ask you about your understanding as to the attitudes of writers and publishers. What is your understanding as to their attitudes towards performance of their music on network television?

THE COURT: Before you ask what the -- your understanding of their attitudes, what you believe their attitudes to be, would you please tell me how you have formed an opinion as to their attitudes, on the basis

of what information or discussions? I am aware of the fact and I have already indicated that I know that you spent a long time in the industry, but I would like to get down a little closer to the ground.

THE WITNESS: Well, I spent a considerable amount of time with individual writers, having lunch with them, having dinner with them, talking to them, at parties with them, in industry discussions with them on panels.

I know a goodly number of them on a first name basis.

THE COURT: Did you have many as clients when you were practising law?

THE WITNESS: Yes, your Honor. Now I see very many writers frequently. I don't discuss individual deals between BMI and writers. I try not to do that. That is handled by another department. But very frequently I will discuss general matters with -- particularly with writers and with publishers too.

It is a very common occurrence when people in the same business get together, we talk about what is going on. Also I can think of instances where a writer will drop me a note or call or leave a message that his work was performed on such and such a network or in such and

and such a show, to let me know about it. He is quite pleased that it happened. Yes, I can think of those instances.

THE COURT: In general that is the kind of background that gives you an opinion is to what the attitude of writers and publishers is.

MR. BRUSKA: Could we also find out, your Honor, by way of foundation, whether Mr. Cramer has had any specific discussions with any specific writers or publishers with respect to use of their music on network television? Other than the several notes that Mr.Cramer just referred to.

THE COURT: Are there any such instances in your mind?

THE WITNESS: Oh, yes. I can go back and think of --I can think of one right now. Carlos Surinach, a very distinguished composer of contemporary music, one of our leading composers. I remember Carlos calling me and sending me a message that his work was going to be used on a CBS television program dealing with the Alamo and how pleased he was to have the opportunity to have his work exposed on that particular show. And I probably even have the note around.

I can think of William Shuman talked to me once,

William Shuman talked to me once or twice about works of his that were done by the New York Philharmonic, I think on CBS. In the pop field it happened many times where you meet a writer and he will say, I had a work that is going to be done, it is on such and such a show three weeks from now, or I just taped it. Or I have just come from a session.

To go back and try to remember other specifics -- these two happen to be fresh in my mind so I recollect them but there were a number, your Honor.

THE COURT: All right, let's get back to the general question. On the basis of that kind of experience over a period of years, have you formed any opinion as to the attitude of writers and publishers towards the use of their music on television?

THE WITNESS: Yes. They want to get it performed.

Q Have you an understanding as to why they want to get it performed?

A Yes. It goes beyond just getting a performing rights from BMI but they like the exposure of their music. Like all creative people, they are convinced that their product is a good one and all they need is to have it

exposed and then people will listen to it and it will become a great success and whether they are right or wrong, that is what they all, all that I have spoken to, those ones that I have had these discussions with and talks with, that is their attitude. Just give me a chance to get it expo[illegible] and the popularity will be enhanced by that exposure and it is a very common experience. They all want to get it exposed.

Q What do they mean by enhancing the popularity?

A Well, if the song had not previously been recorded by a major artist, it is a chance for somebody to listen to it and perhaps pick it up and get a recording or make a recording of that song. If the song is presently recorded and available it would help in their judgment to stimulate the sales of the existing record, just like book authors go on talk programs to stimulate the sales of their books. That is why they want to go on the shows. That is just very natural for them.

Q Mr. Cramer, assume for the moment that CBS canceled its ASCAP and BMI licenses and announced that it would only use music, the public performance rights to which had been licensed either by CTN or by CTN program producers directly from writers and publishers.

THE COURT: Can we also assume that NBC and ABC are still licensed.

Q Let's assume that NBC and ABC are still operating under ASCAP and BMI licenses.

In that situation would you expect that writers and publishers would be inclined or disinclined to grant licenses directly to CTN for CTN program producers?

A They would be inclined to grant such licenses.

Q And what is the basis for that?

A They don't have very many other places to go. There are only three national networks and there are a lot of writers, a lot of product is being turned out and under those circumstances, I think the writers, particularly the writers, would be quite eager to deal with CBS.

Of course, as discussed earlier, the exposure certainly helps them in other areas as well.

That is particularly true if they happen to be a writer-performer, where the exposure is of even greater significance to them.

THE COURT: Yes, I would imagine.

Q Mr.Cramer, you are aware, are you not, that CBS's proposed alternative form of relief in this action is an injunction against the licensing of television networks by BMI and ASCAP?

A Yes.

Q How would you compare blanket licenses with other types of licenses in terms of advantage to the public?

A I think it is no question in my mind that in the terms of what is ultimately in the public interest, that the blanket license serves that kind of function. Broadcasters have to program not, in theory should program,

what is in the public interest, convenient and necessary, not necessarily what is the cheapest product to turn out.

They have an obligation to program in the public interest and up to this point, the blanket license and the combination of blanket and per program license has worked very well because there is a lot more music available than ever before.

We have more writers, both ASCAP and BMI. There is more product coming out, and the main source of economic stimulation for that comes from broadcasting and a great deal of it from the networks.

But what this does, the blanket license does, is to say the guy that is putting on that program, you select whatever music you want, but select it on the basis of what you think the public wants to hear and that is a major factor in the selection of music, not the sole but a major factor, and I think that because of that, blanket licensing has a decided -- I won't say advantage -- but blanket license, really, in that sense, is in the public interest.

MISS KEARSE: I have no further questions.

THE COURT: Mr. Topkis?

MR. TOPKIS: I have no questions, your Honor.

THE COURT: All right.

MR. TOPKIS: May I just ask one? Just so that the record may be absolutely clear, and I think it probably is --

CROSS-EXAMINATION

BY MR. TOPKIS:

Q Mr.Cramer, when you were talking about attitudes of writers and publishers as you understood them, did you intend to convey the idea that there was or was not any distinction in those attitudes, depending on whether the writer or publishers were affiliated with ASCAP or BMI?

A No difference. In fact, when I meet with a publisher, usually he has both ASCAP and BMI interest and we don't try to divide the conversation to what we are talking about.

MR. TOPKIS: Thank you.

MR. HRUSKA: Your Honor, it is a little early for the morning break, but I think if we --

THE COURT: You want to take a couple of minutes

MR. HRUSKA: If we can take 10 minutes now, I think I can probably shorten the cross-examination.

THE COURT: All right.

(Recess.)

CROSS EXAMINATION

BY MR. HRUSKA:

Q In your discussions in 1969 with Mr. Sipes, do you recall stating in substance that our music was being widely used on the CBS Television Network and we were not being paid proportionately to the use of our music?

A Yes.

Q And do you also recall, Mr. Cramer, taking the position that the same amounts of money should be paid to the two catalogues, ASCAP and BMI, without regard to what is in them looking only to useage?

A I don't think it was discussed in those terms at all.

Q Well, that is certainly your position today, isn't it, Mr. Cramer, what I just said?

A Would you repeat that question or have the reporter read it back to me.

THE COURT: Please read it back.

(Question read.)

A My position is that we should be paid in accordance with the amount that we contribute to the network and if we contribute as much as ASCAP we should be paid as much as ASCAP is getting.

Q And that amount should be measured by useage?

A Not completely but primarily, yes. Primarily but not wholly.

Q I would like to refer, direct your attention, to the deposition you gave in BMI against NBC which was an action recently settled in this court--

THE COURT: Thank goodness.

Q And at page 151 at line 17, the question was asked I think by Mr. Hyde who was conducting the examination:

"Well, is it your position, then, that the same amounts of money should be paid to the two catalogues without regard to what is in them looking only to useage.

"Answer. Yes."

Do you see that, Mr. Cramer?

A Yes.

Q And that was the testimony you gave?

A That's correct. That's basically correct.

Q Now, when you mentioned the useage factor to Mr. Sipes in your meetings in 1969, do you now recall that Mr. Sipes said to you in substance, if useage is the measure, then why don't you give us a license in which the payments are made in accordance with the use that we make of the BMI repertoire, in other words, a per use license?

A As I testified earlier today, that was never dis-

cussed, never mentioned by Mr. Sipes and so my letter which has been previously marked as an exhibit indicates that as well.

Never.

Q Whatever your letter indicates, it will be indicated by the letter.

THE COURT: Have you seen Mr. Sipes' testimony on this point?

THE WITNESS: Yes, your Honor.

THE COURT: I take it you disagree with his version of the discussion?

THE WITNESS: Absolutely.

Q I would like to show you PX 247 for identification.

THE COURT: 247?

MR. HRUSKA: Yes, your HOnor.

Q Is this the current BMI form of writer affiliation agreement?

I might indicate that it was supplied to us, your Honor, by counsel for BMI with that identification.

MISS KEARSE: When was that supplied with that identification?

MR. COLLINS: About a week ago.

Q Mr. Cramer, do you have any question about it?

THE COURT: Or any comment?

THE WITNESS: On the last page there is a date in small numbers, it says 7-72. I am sure that that was the agreement in effect at that time. The only reason I hesitate to say whether it is currently in use today--

THE COURT: Do you have a question as to whether it was revised?

THE WITNESS: I recollect seeing the forms printed on green but if there is any difference at the moment, to save you a lot of trouble, there is not a material difference but I can't honestly say whether it is the one today or not.

If there are any revisions, they are not major revisions.

MR. HRUSKA: I would like to offer this contract to complete the picture, your Honor.

MISS KEARSE: I object on the grounds of relevance, your Honor.

THE COURT: I think you made that objection earlier and I have overruled it. Is this the BMI form of contract with the writer?

MR. HRUSKA: Yes, your Honor.

THE COURT: Received. I don't know if Mr. Topkis--

MR. TOPKIS: I have no objection.

THE COURT: It is received in evidence.

xx (Exhibit PX 247 is received in evidence.)

Q Could you look at paragraph 4A of that agreement. Maybe we should hand one up, your Honor, since it is in evidence and it would be easier to follow this although I have very few questions on it.

THE COURT: Thank you.

Q Do you see that, Mr. Cramer?

A Yes.

Q Could you tell me what the "except" clause refers to?

THE COURT: Except to the extent--

MR. HRUSKA: Yes, your Honor.

THE WITNESS: Any works that they had previously conveyed somewhere else.

Q Like in the ASCAP repertoire?

A Well, whether ASCAP or any other way, they just list an exception, that's all.

MISS KEARSE: Your Honor, I object to these questions. They are beyond the scope of direct. It seems to me they are calling for legal conclusions and they are dealing with a paragraph of this agreement which is not relevant because of the stipulation between BMI and CBS,

which Mr. Hruska adverted to earlier this morning.

THE COURT: That gives me a lot of things to decide.

As far as its calling for a legal conclusion, I think Mr. Cramer is competent to give one.

As far as its relating to the stipulation material, since I ruled that BMI had a right to go beyond the stipulation, I certainly think Mr. Hruska has a right to cross examine in relation to it.

Now, that leaves the question of whether it is in general outside the scope of the direct and what it is relevant to, I would like some kind of offer.

MR. HRUSKA: I think it is useful and important in this case to understand the relations between the-- between BMI and its writer members.

THE COURT: So do I, but what significance is it ultimately going to have that BMI does have an exception in this clause for licenses granted by its affiliates before they signed this license?

MR. HRUSKA: I think it is probably a peripheral point, your Honor. This is the one area of this contract that was not --

THE COURT: You just weren't sure what it meant?

MR. HRUSKA: Exactly.

THE COURT: All right. It seems to me harmless and probably irrelevant.

Q I think we had an answer to that so let me go on.

Do you have any form or have you ever had within your experience any form of BMI agreement with writers which differed in any way from the substance of Paragraph 4(a) of PX472?

THE COURT: Are you asking whether in effect throughout its history BMI has always had a clause similar to 4(f)?

MR. HRUSKA: Or at least throughout its history to the extent that Mr.Cramer is familiar with it and familiar with the affairs of BMI.

A I don't know of any prior contract with a clause which was substantially different. There may have been some minor changes, but I am not aware of any major changes as the result of policy changes.

There may have been some minor changes, but not to my knowledge.

Q I would like to show you two forms, BMI forms, marked 471A for [illegible] PX471A for identification and PX471B for identification, and ask you whether those represent respectively BMI's current agreement with its publisher affiliates and the form of renewal of that agreement?

A I'd have to give you the same answer as I gave you as to the writer ones. These bear a date on the last page of 9-72. If there are differences, they are not material differences to those in effect today.

THE COURT: Which is which, the master agreement is 471A?

MR. HRUSKA: Yes, your Honor.

THE COURT: All right.

THE WITNESS: Your Honor, I don't necessarily accept that characterization of them because I haven't looked at the text of these agreements, so I can't tell you --

THE COURT: One is an agreement and the other is

a renewal of an agreement apparently.

THE WITNESS: I am not so sure of that.

THE COURT: Will you please look and tell me?

THE WITNESS: I am and I don't find it so quickly on the face of these agreements.

THE COURT: All right, take your time, but I would like to know sooner or later.

THE WITNESS: I don't think one is an extension of the other. These are both contracts for a period of five years. I don't understand what counsel -- maybe he could point it out to me, but I don't see it on the face.

Q Could you look at Paragraph 20, Mr. Cramer, and see whether that clarifies the situation?

THE COURT: Of which?

Q Of 471B, the document which we had thought was the renewal form.

A What Paragraph 20 does is cancel and supersede a prior agreement where there was an existing contract between the parties. The other one is one where there apparently has not been a prior agreement between the parties, but that is the only difference that I see, your Honor.

Q Between the two forms?

A On the face of it that is the only difference that I see. The agreement which has been marked Plaintiff's

471 for identification has 19 numbered paragraphs. The document which has been marked 471B for identification has 20 numbered paragraphs. On a quick look, the only difference I see is the addition of Paragraph 20 in Plaintiff's Exhibit 471B for identification.

THE COURT: All right, I understand.

MR. HRUSKA: I would like to offer the two exhibits into evidence.

MISS [illegible]: Same objection, your Honor.

THE COURT: Same ruling. Exhibits 471A and B are received in evidence.

(Plaintiff's Exhibits 471 and 471A and 471B, respectively were received in evidence.)

MR. [illegible]: We have never received copies of those. If you are going to ask questions about them, may we be supplied copies?

THE COURT: The one that has 19 paragraphs is A?

MR. HRUSKA: Yes, your Honor.

Q Referring to Paragraph Third A of both of these forms, would you give the same testimony regarding the "except" clause in those paragraphs as you did with respect to the "except" clause in the writer affiliation agreement?

A Yes.

Q Has the substance of Paragraph Third A remained the same in your experience with BMI?

A In substance, yes.

Q Did you participate in the negotiations with the Department of Justice concerning the BMI consent decree of 1966?

A Yes.

THE COURT: In what capacity was that, Mr. Cramer?

THE WITNESS: I was special counsel to BMI.

Q I would like to show you a copy of that consent decree and ask you to refer to Paragraph 4. You see the phrase in Paragraph 4, direct performances to the public?

A I see that phrase.

Q Do you agree that that phrase is limited in meaning --

A Excuse me, what was the phrase again?

THE COURT: Direct performance to the public.

THE WITNESS: Oh, yes. My, I skipped. There is another phrase directly to the public, but you are referring to the one direct performances to the public?

MR. HRUSKA: Right.

Q Do you agree that that phrase is limited in

meaning to performances made in front of a live audience?

MISS KEARSE: Your Honor, I object to questions which ask the witness to interpret the consent decree either as a matter of law or on the basis of knowledge which he may have gained as BMI's counsel. I also object on the ground that this is well beyond the scope of the direct examination.

THE COURT: I think it is bothersome practice to question a witness about what the interpretation of a decree is to be. I do recognize the special competence of this witness to be questioned on the subject as a participant, as a lawyer and a party. I don't think there are any privileged questions involved because he has been called by BMI as a witness, and this seems to be non-privileged material anyway.

MISS KEARSE: I might point out, your Honor, he did not testify with respect to this decree on direct examination.

THE COURT: That is true. I will sustain the objection.

MR. HRUSKA: Well, your Honor --

THE COURT: What are you trying to bring out?

MR. HRUSKA: I am trying to bring out, your Honor, that this phrase is as limited as I had indicated in my question, for the purpose of showing that BMI's rights are truly quite exclusive interms of the musical copyrights in the BMI repertoire.

Now, I think that point is relevant at least, your Honor, to the Section 2 area of the case. Specifically, that element of Section 2 concerning the deliberation with which the market power was acquired.

THE COURT: I certainly don't think that the witness was questioned on direct examination with regard to that subject matter.

MISS KEARSE: Your Honor, we also have a stipulation between BMI and CBS which states specifically that whatever the Court finds as to the practicability of CBS getting licenses directly from ASCAP members shall govern the practicability as to their getting licenses

directly from BMI affiliates.

Now, this, it seems to me, is an effort to contradict the terms of that stipulation.

THE COURT: I am not sure that I agree with either of you in your interpretation of the stipulation, but the door was opened with regard to additional testimony in addition to the stipulation.

Is this on the bypass? This relates to the bypass or the question of Section 2? That seems to be two different matters. Section 2 of the Sherman Act you are talking about, I assume.

MR. KRUSKA: Yes, your Honor. Section 2 of the Sherman Act.

I must say I am a little confused about BMI's position with respect to the stipulation based upon the direct examination.

But on Section 2, I would like to say, your Honor, that I am operating under the ground rule that to the extent that there are important statements made in other papers which we had not offered into evidence, working on this ground rule, that about which live testimony would be of significance that we should bring that out when the witnesses appeared.

We did that with Mr. Finkelstein and we took

him through various passages of his deposition. I am now really referring to a passage in the deposition of Mr.Cramer taken in the BMI against NBC case, where he did give testimony on the subject covered by my last question.

THE COURT: That doesn't mean , of course, that while the principle, as you have just enunciated, may be applicable just as much in Mr. Cramer's case as Mr. Finkelstein's, it doesn't mean that what is offered in evidence is relevant or whether it is not or whether -- we didn't have a situation in which you asked Mr. Finkelstein to construe the terms of the decree as I recall.

MR. HRUSKA: That is true.

THE COURT: I really don't understand. When it comes to construing the terms of the decree the proper way to do that isn't for the lawyers to argue what it is. If there is any ambiguity about it -- what ambiguity is there supposed to be about this phrase?

MR.HRUSKA: Of course we would interpret it the way I just indicated in my question. To the extent there was ambiguity about it, then parol evidence would be relevant and Mr.Cramer did participate in the negotiations.

THE COURT: But the point is, it seems to me, we really have a preliminary finding to make if there is

any ambiguity here and I haven't been faced with this question at all. I am not quite sure I even understand precisely what the question is at the moment. I am certainly not prepared to rule at this moment that there is something ambiguous in this Clause 4A which requires anybody's testimony and for the moment at least I will therefore sustain the objection.

If you wish to clarify, after we have finished with Mr.Cramer's other testimony, if you wish to clarify the matter by argument, I will consider it further.

MR. HRUSKA: All right. I am sorry. I missed the beginning of that. Clarify it now by argument?

THE COURT: No. I say after Mr.Cramer's testimony on other matters is finished, if you want to point out what you think is ambiguous, I will rule on it.

MR. HRUSKA: I wonder if we could perhaps shorten even that by asking whether BMI takes a position with respect to the interpretation of that phrase.

THE COURT: Of course the mere fact that there may be a conflict doesn't necessarily mean that I would rule there is an ambiguity.

But if there is no conflict, that would solve it.

Do you want to ask Miss Kearse?

MR. HRUSKA: Yes.

It is whether or not BMI would agree that the phrase "direct performances to the public," in Paragraph 4 of the BMI consent decree is limited in meaning to performances made before a live audience.

MISS KEARSE: I think it is a matter for argument, your Honor, but I don't see why BMI should have to take a position on that.

That matter is irrelevant in this case.

THE COURT: All right. If that is your position.

Q Now, I would like you to assume, Mr. Cramer, that ASCAP and BMI are enjoined from licensing television networks.

Do you believe that the market for the licensing of performance rights to television networks will function or would function under those circumstances?

A I have difficulty answering that your Honor. I don't think I fully understand it.

Could I--

THE COURT: Do you want to ask Mr. Hruska some questions or you want to ask him to rephrase it or what?

THE WITNESS: Maybe if I listen to it again I'll be able to understand it.

THE COURT: Will you read it, please.

(Question read.)

THE WITNESS: Your Honor, I have difficulty knowing what he means by the market for licensing under these circumstances.

I just am a little confused.

THE COURT: Do you want to clarify the question to the witness.

MR. HRUSKA: Yes, your Honor.

Q If ASCAP and BMI were enjoined from licensing television networks, would the networks and the copyright

owners in your opinion be able to achieve such contact so as to permit the networks and the producers of network programs to license their performance rights requirements?

A They could acquire music if that's--

THE COURT: The networks?

THE WITNESS: They could acquire music.

THE COURT: They could?

THE WITNESS: They could.

Q Sufficient music to fill their performance rights requirements?

A Your Honor, I think at that point we get into an arguement as to what their requirements are and whether it would be--and I believe a requirement is that they program in the public interest.

THE COURT: Right.

Q Let's use that as the index.

A Now, to the extent that that is a factor, it has to be considered but I believe that they could get enough music together on the air with and could program.

MR. HRUSKA: So as not to be accused of repeating a question which has been answered, your Honor, I would like to press for an answer to my question which I believe was not answered.

The question was whether the market would functior

sufficiently to enable the networks and the producers of network programming to fill their requirements and Mr. Cramer has answered the question in terms of they would get music on the air.

There seems to be a difference between the two.

THE COURT: He also added thereafter, but you may still be entitled to some further elaboration, the phrase "enough to go on the air and program."

Now, Mr. Hruska is putting it in slightly different terms--"enough to fulfill their requirements."

Would you explain to us what you think the TV network music requirements are and then tell us whether you believe that without ASCAP and BMI's licensing, if you have an opinion on this, they would be able to fulfill those requirements.

Miss Kearse?

MISS KEARSE: With all due respect, I am not sure that Mr. Cramer should be required to tell us what CTN's music requirements are.

THE COURT: He is not required to. I am only asking him to tell us that if he has a point of view on the subject. He is an experienced man and it is not unreasonable to believe that he may have an opinion as to what a TV network's music requirements are.

THE WITNESS: It is hard for me to answer my own question as to what their requirements are.

THE COURT: How do you conceive of their requirements?

THE WITNESS: Well, they need music for virtually every program that goes out over the air. They use feature music and they also make station use of background, theme and cue music.

Now, they could go on the air and get background music, theme music and feature music to fill their programming day if they had to deal with writers and publishers directly.

THE COURT: Now, that certainly covers the question of quantity because I assume that when you say enough music by definition you mean quantity?

THE WITNESS: Yes, your Honor.

THE COURT: They could always have as much music playing on the networks as they now have; is that correct?

THE WITNESS: Exactly correct.

THE COURT: Do you have any opinion as to whether they could also get the quality of music that they would need?

MR. HRUSKA: Perhaps we could add by way of clarification, so as to fulfill the obligations which you

referred to on direct examination, namely, operation in the public interest.

THE WITNESS: I think they could do it but with far greater difficulty than they now have.

Q I would like to show you, Mr. Cramer, PX 513 which is in evidence.

Could you look at paragraph 5B which is on page 3-- specifically, the statement, "the great preponderance of the feature songs selected for use on CTN are songs which have become very popular on radio or are likely to become popular because their composers have producer other extremely popular songs."

This is a statement, Mr. Cramer, you made in October 1970.

Do you have any reason today to disagree with that statement?

A None whatsoever.

Q Do you know how often a musical composition is performed on CTN in a feature capacity which has not already been recorded in a phonograph record?

A No.

Q Do you have any reason to conclude that it's ever happened?

A Sure.

Q Tell me that reason?

A Because sometimes songs are performed before they are recorded.

Q How do you know that, Mr. Cramer?

A Well, there have been instances where songs have been specially written, not background music, but specially written for television. That's one illustration.

There may be other songs which are performed before the recording. These things are not--they happen.

Q Do you know of any instance in which a song was performed on CTN before the recording, any instance other than that dealing with music especially created for the program?

A You mean do I--am I able to recollect the title that was performed before the song was recorded?

Q I will make it broader than that.

You don't have to recollect the title. Can you

specifically recall any instance of this occurring?

A You don't--do you mean that the artist who performs it on television is the same artist or not the same artist that recorded it?

Q It doesn't make any difference. Either way.

A Well, there are many cases where songs are performed by artists on television that that artist did not record.

Q That's not the question.

A I am sorry. I asked for a clarification. You said either way.

THE COURT: I think Mr. Hruska meant either way the other way.

Q So the record is clear, let me restate it.

THE COURT: Just a moment, Mr. Topkis.

MR. TOPKIS: Your Honor, I think the classic definition of irrelevant is that the answer is, one way or the other way, does it make any difference, and I think we are now in exactly that situation.

What's this got to do with this lawsuit.

MR. HRUSKA: Mr. Cramer testified on direct examination that there were instances on which songs were performed on network television prior to their being recorded. And I want to know whether that ever occurs to his knowledge except

in the situation where the song was especially composed for the program.

THE COURT: I'll allow the question. But I gather that what you are asking him was not whether a song was ever sung on television by somebody who had not sung it in the recording, but rather, whether it was ever sung on television if it hasn't been recorded at all, am I correct?

MR. HRUSKA: Yes, your Honor.

THE COURT: Do you know about that, Mr. Cramer?

THE WITNESS: In the contemporary serious music, for example, it is not unlikely. I am trying to think of a specific where a symphony would do a concert and that work is not as yet recorded. That's, I think, a more common and easier illustration that comes to mind almost immediately where that happens.

Of course, it is very difficult, particularly these days, to get a recording of a serious work so that very often the performance precedes the recording. That's more true in the case of a contemporary serious work than it is in the pop field.

Certainly in the pop field there is material that appears on some of the variety shows that have not been recorded.

THE COURT: I think rather than spend this kind--

if your questioning arises, Mr. Hruska, because you say that Mr. Cramer testified on direct here?

MR. HRUSKA: Yes, your Honor.

THE COURT: That songs were sung on television before they had been recorded and frankly, I didn't recall that--

THE WITNESS: I did not say that, your Honor, except--

THE COURT: If you are only trying to limit his testimony, let's see what he meant.

Is that what you said on direct or meant to say on direct?

THE WITNESS: What I said, your Honor, was that writers and publishers like to get their music performed on television.

THE COURT: Right.

THE WITNESS: And that aside from the performance income, it is a way of exposing the works to the public and I specifically recall illustrations. Carlos Surinach's work he wrote for a show dealing with the Alamo and he called me and told me he was so pleased he was going to have the work performed over national television.

THE COURT: Do you know whether that work was recorded before it was performed?

THE WITNESS: It wasn't recorded before it was performed and to the best of my knowledge it has not been recorded even now. But it was in that context that I gave this illustration.

THE COURT: You are not talking generally about popular music?

THE WITNESS: I did not in that illustration either

THE COURT: All right.

Q Have you read the testimony of Walter Dean in this case?

A I have not.

Q Have you ever had any occasion to make a study as to the impact on the sales in the stores of phonograph records after a television network performance of a song in one of those records?

A I have not made such a study.

Q Have you ever heard of the results of any such study?

A I never even heard of such study. Not the results but I never heard of such study.

Q I would like to show you the BMI trial memorandum in this case, specifically pages 35 and 36, and ask you whether you agree with a statement which appears in the last complete paragraph on page 35, namely, "a withdrawal right

would give to the writer or publisher of any musical composition already in a feature film or in a film to a taped program which CBS has or will acquire the right to telecast the power to name his price for public performance rights."

And then there is a statement on page 36, a related statement which says "thus the withdrawal right, a right which in fairness the writer or publisher absolutely must possess, will result in occasions on which CBS will be unable to use finished material without paying very large sums for performance rights. Clearly CBS would find this intolerable."

A Is the question do I agree with that statement?

Q Yes, Mr.Cramer.

A May I look at the entire paragraph, your Honor, to put that in context? This is not something I have written. I would just like to see it in context.

THE COURT: It really isn't a question -- Mr. Hruska uses the brief for the purpose of asking you the question without a brief too. However, if you would like to look it all over --

THE WITNESS: This will take me about ten seconds.

THE COURT: Take your time. I just mean the question doesn't depend on the fact that it comes from a brief.

THE WITNESS: I agree, in part, with that statement.

Q Could you indicate the part with which you disagree?

A In the first paragraph that you quoted on Page 25, the last sentence -- 33, I am sorry, where it says that the writer or publisher would have the power to name his price, I don't completely agree with that, he would have the power to name his price. I think -- I don't agree with it.

He could name a price, that is what it means, name any price. To name *any* price, I don't agree with that.

Q Would you agree in those circumstances he could exact a very high premium?

A I say in some cases he could ask for a premium and insome cases he couldn't. It depends on how the music is used in the film. Sometimes it is easy to take the music out and sometimes it isn't. So it is very difficult for me or anybody else to give you one answer to cover all those circumstances. Again, it depends on how the music is used in the film.

Q Your counsel put in PX101 during your direct examination and the date of this agreement was as of March 11, 1959.

Do you recall or doyou know what the radio -- BMI's radio network blanket fee rate was at that time?

A No, I do not. Excuse me, a minor point. I don't know if it is of any significance. It doesn't say as of. It just says eleventh day of March, 1959.

Q I think that is the first agreement I have ever seen in this field that was not as of.

THE COURT: Is that the --

MR. HRUSKA: This is the per program license for the CBS radio network.

THE COURT: Okay. And what was your question again, Mr. Hruska?

MR. HRUSKA: My question was whether Mr. Cramer knew what the blanket rate was at that time. This license shows a per program rate of 4 per cent, basic rate of 4 per cent.

THE COURT: Right.

Q Do you have any recollection, Mr.Cramer, as to whether the blanket rate for television networks at that time was --

THE COURT: Television?

Q For radio networks, I am sorry, was at or below one per cent?

A I have no recollection as to what the BMI radio network license was in 1959.

Q Do you know whether NBC and ABC radio networks had a blanket license or had blanket licenses then?

A I believe that they did.

MR. HRUSKA: I would like, your Honor, to call for the production of those two agreements between BMI and NBC and BMI and ABC.

THE COURT: Is it necessary to have the agreements or just a representation as to whether they were a blanket license or not.

MR. HRUSKA: I would be perfectly content with a representation if that is the case, that they were blanket

licenses and that the rate was whatever it was.

THE COURT: I ask Miss Kearse to supply the information.

MISS KEARSE: I first would like to make an objection on the ground of relevance.

THE COURT: I am not asking you to make a representation at this time unless you are able to do so.

I will overrule your objection and askyou to secure the information.

Q Mr.Cramer, do you know whether a per program license is more difficult for BMI to administer than a blanket license?

A I don't know if there is really that much difference in the administration. I have to think about that. We had such a small amount of experience, limited experience with per program licenses where you have six as against seven thousand. I have great difficulty generalizing. I don't see any great difficulties in processing---

THE COURT: There certainly would be an increased number of billings, wouldn't there, if I understand it correctly. Your fee for a blanket license is set for a whole year or whatever the period is, whereas the per program,you hage to at least check to find out on what program the music occurred, do you not?

THE WITNESS: Well, the fee that is paid is usually paid monthly. In the case of television station, for example, your Honor, they file a monthly report with income and deductions so there is a monthly accounting job involved.

Now, if the station that is on a per program license is going to use a very limited amount of music and it reports to us, there may not be great difficulty in analyzing the submission, but obviously if they use a lot of music, they are not going to go to per program, so it could be that the amount of bookkeeping is fairly limited but I cannot make a generalization based upon half a dozen stations.

Q You know the fee is a fee paid for each program using BMI music so you have to do some, perform some check that the programs containing BMI music are programs in respect of which a fee has been paid, right?

A Yes.

Q And also since the fee is related to the income of the program using BMI music, you have to do something to insure yourself that that income has been correctly stated to you, right?

A As to that question, when CBS and other networks

were reporting to us under the blanket license, we weren't very successful in getting them to disclose what the accurate reports were.

MR. HRUSKA: I move to strike that, your Honor. I don't think it is responsive to the question and it is irrelevant to this case.

THE COURT: I am not sure until I hear Mr. Cramer's complete answer.

A We don't at this particular point and have not in the past audited stations with blanket licenses.

THE COURT: No, I thought Mr. Hruska was asking something else. Let me ask something else. With regard to the six stations that you do have, do you know anything about the experience there, how do you check to find out how much music they use?

THE WITNESS: They submit program logs to us and we examine the logs.

THE COURT: Do you audit those stations?

THE WITNESS: No, your Honor. They are not very significant stations, by the way. They are minimal, I don't know of a major station in the United States that today has a per program license.

THE COURT: Thank you.

MR. HRUSKA: By the way, your Honor, I would like to mention this. We had referred previously to a portion of the BMI trial memorandum. I am not clear on this, but perhaps I can clarify it.

Are we operating in the case on the ground rule that briefs --

THE COURT: Are part of the record?

MR. HRUSKA: Are part of the record and they may be referred to, and affidavits, in the Court of Appeals? It seems to me a simplified --

THE COURT: I operate on that assumption and am advising everybody that I do.

MR. HRUSKA: We haven't been uniform in it up to now.

MISS KEARSE: I am not sure I understand your Honor's ruling.

THE COURT: The question is whether I consider a brief to be part of the record so that a statement from it can be quoted and argued and referred to and I have just said that I do and that I also consider affidavits in proceedings that are part of this case to be part of the record here.

That doesn't mean of course that what one party may excerpt from a brief or an affidavit I necessarily will agree to be relevant or that it proves anything, but I think that it is unnecessary formally to place such material in evidence.

MISS KEARSE: I question, your Honor, whether affidavits submitted on earlier motions and so forth should be deemed part of the trial record, especially if they were offered by the party that submitted the affidavit in the earlier proceedings and not subject to cross-examination and so forth.

THE COURT: I certainly don't mean to suggest that Mr. Hruska put in the affidavit of Mr. Sipes to prove a proposition by Mr. Sipes, but I mean for purposes of showing inconsistencies or limiting the testimony of an opponent.

MR. TOPKIS: And so far as that is concerned, your Honor, I take it Mr. Hruska would not be allowed to

put in a BMI trial brief or to refer to it insofar as ASCAP is concerned.

THE COURT: That would be my ruling. We are really talking about whether quote admissions unquote that may be found in such papers as we have been discussing can be brought to the Court's attention without being formally placed in evidence and I am saying yes.

Q Would you look at PX512, Paragraph 3. Specifically, the statement -- and this is Mr. Adler's affidavit, I believe -- the statement, "It must be recognized that because of BMI's existing bonus system it would be impossible to determine in advance how much BMI would pay to any specific affiliate for network television performances."

Is that a statement with which you agree, Mr. Cramer?

A Yes.

Q Now, in the event that a television network canceled its ASCAP and BMI licenses and the other two networks retained their ASCAP and BMI licenses, do you believe that there would be any connection between the indeterminate amount of bonus obtained by a BMI affiliate and the amount that that affiliate would charge a producer of a television program in direct licensing?

A I can't answer the question because I don't understand it.

THE COURT: It is a very good reason.

MR. HRUSKA: The best.

Q Let me make it more concrete.

THE COURT: I was taking notes and I am not sure whether I got it right, but the impression that came through is thatyou are trying to find out from Mr. Cramer what his opinion is as to what the effects on this ability or inability to predict payments to BMI because of their bonus system would be if CBS cancelled its license with BMI.

Is that right? And if not, disregard my question and just put it again.

MR. HRUSKA: I think it is right, your Honor, except that I think the word your Honor used, the effect of -- the effect on, should be the effect of.

THE COURT: I meant to be the effect of.

Q In other words, we have, Mr.Cramer, a BMI bonus system. Mr. Adler has said in this affidavit and you agree that because of that system you can't tell in advance -- an affiliate of BMI could not tell in advance how much in bonus moneys that affiliate will earn as a result of a television network performance.

The question is, is there in your opinion or

would there be in your opinion any influence on the price that a BMI affiliate would charge in direct licensing a television network or a producer of a network program stemming from this indeterminate amount of bonus which would have been earned had the use been licensed from BMI.

MR. TOPKIS: I object.

THE COURT: Well, I can't say I think Mr. Hruska has put it in as simple a form as possible, but I do think that Mr.Cramer's opinion as to whether peculiarities within the present BMI rate structure will have an influence on the way BMI writers and publishers negotiate with the networks directly is relevant and I guess that is what you are asking.

MR. HRUSKA: That is the substance of it, yes.

MISS KEARSE: Your Honor, I think it is not relevant if it is claimed that there is some peculiarity by virtue of the stipulation, which is that as to the practicability of reaching BMI wroters and publishers, CBS and BMI are bound by what the Court finds with respect to ASCAP members.

THE COURT: I must admit I hadn't thought about the stipulation.

What about the stipulation, Mr. Hruska? It

seems to me Miss Kearse has a good point there and Mr. Topkis apparently had it first, though I didn't recognize it.

MR. TOPKIS: Miss Kearse will often articulate my unexpressed thoughts, your Honor.

MR. HRUSKA: I marvel at your communication.

What about the stipulation, your Honor, whether the stipulation precludes this?

THE COURT: Yes.

MR. HRUSKA: Well, I think it is apples and oranges.

THE WITNESS: Bananas, maybe.

THE COURT: Can I see the stipulation again? I mean I guess there is no point in our arguing about the effects of the stipulation without remembering what it is.

MR. HRUSKA: This question is not related to the obtainability of music as such.

THE COURT: It seems to me it is. I gather what you are driving at is that perhaps somebody raised on the BMI system and addicted to the happy prospects of a bonus might give a network a harder time than if they hadn't been. Isn't that what you are trying to establish?

MR. HRUSKA: No. But rather than explain it all now, I am just going to drop the question.

THE COURT: As a matter of curiosity, Mr. Cramer, and I am sure everybody is going to object if I ask you this, how does the bonus system work?

THE WITNESS: It works well.

THE COURT: I mean what are the factors that go into deciding the basis of it or is that a trade secret?

THE WITNESS: I would say that since we are a non-profit operation, what I tried to do is to evaluate and see what we have toward the end of the year and how we will distribute that over and above the pre-fixed rates.

THE COURT: Do you have a certain objective price rating for distributions?

THE WITNESS: Yes. If a writer obtains some performances in such a period of time, there are these criteria, but the total amount depends upon the availability of funds and things of that sort but we have distributed, we distribute to writers in advance, and the publishers, the qualifications necessary to reach the various plateaus in the bonus system.

Those are submitted to them and filed with the Department of Justice every time a change is made.

THE COURT: I see.

Q BMI now has outstanding license agreements with NBC and ABC, is that true?

A The networks?

Q Right.

A Yes.

Q NBC and ABC Television Networks.

A Yes.

Q And is it also true that under each of those agreements, NBC and ABC have the right to obtain per use licenses from BMI in the event that CTN obtains such a license from BMI?

A I don't think that the agreement is in that form but what it does say is that any other license that's available to any other network they have got the right to get it, if they want it, just as they do under our consent decree, yes, sure.

It doesn't specifically mention a per use license or any other kind of license. That's the best of my recollection on that clause.

Q Now, I would like to show you PX 511, which is a BMI brief submitted in this case and ask you to turn to page 8.

Could you look at the first complete--in fact the only complete paragraph on that page and this is discussing the CBS per use proposal that was made in the context of BMI's motion for a preliminary injunction at an earlier stage in this case.

The specific sentence that I would like you to focus on, Mr. Cramer, to see whether you agree with it is a matter of your judgment is.

"In order to induce a BMI affiliate to license CBS directly, it would presumably be necessary to pay the affiliate more than he would receive from BMI."

Is that a statement with which you agree?

MR. TOPKIS: Under what circumstances?

THE WITNESS: May I say, in those context, the context of this motion, which was for an interim license and a different proposal, entirely different--

THE COURT: Right. I think that in order to permit that, for me to permit the question, Mr. Hruska, you would have to specify whether you believe that under a per use system that will be necessary or whether under the present system it would benecessary or under what system, or under what set of facts.

MR. HRUSKA: If it would have been necessary, your Honor, under the set of facts proposed--

THE COURT: You said it would have been except Mr. Shapiro, Miss Kearse--

MR. HRUSKA: That's why I want to know whether Mr. Cramer agrees with it.

THE COURT: I am not even sure whether I agree

with the statement or not because I am not sure, coming on it cold like this after all this time, to what state of facts this statement refers and I would, therefore, I sustain an objection to asking the question in relation to the material in the brief.

If you want to ask Mr. Cramer his views on any set of circumstances regarding whether it would be necessary for CBS to pay more than is now distributed by BMI, I may do so and later on relate that answer to what you contend this brief states.

But I think it will only lead to confusion doing it the way you were about to.

MR. HRUSKA: All right.

Q In the event that a per use system was established in this case or as a result of this case, and the system provided for per use payments by CBS to BMI which were equal to the present BMI payment schedule, do you believe that in order to induce a BMI affiliate to license directly, that it would be necessary to pay the affiliate more than he would receive from BMI?

A I think there may be a mistake in the question, if I understand it and if there is not a mistake then I clearly didn't understand the question.

THE COURT: What is the mistake that you believe

may be there?

A Could you read it back and I think it is in the first opening of that.

(Record read.)

A You mean you are going to pay BMI under the per use--under this question?

THE COURT: Yes. Mr. Cramer, the proposal is that if there were a per use system put into effect by the Court, a list of schedule of per use rates would be worked out for the pool of music to which BMI had the licensing rights and which your affiliates had not withdrawn from that pool.

THE WITNESS: Okay. I understand the question now, thank you.

The question is, would we have to pay the writers more?

THE COURT: Would CTN have to pay them more in order to get them to do direct business than you pay them?

THE WITNESS: No.

THE COURT: What was your answer?

THE WITNESS: No.

THE COURT: I suppose you may wish to ask him why he answers no, but he has answered.

MR. HRUSKA: He has answered.

Q Well, do you recall in the motionfor a preliminary injunction that the BMI motion for a preliminary injunction that CBS proposed that the motion be granted but that in lieu of a lump sum fee, a flat fee, payments be made on the same basis as the BMI payment schedule?

A I have a recollection of that. I don't recall the details at this point in time. I just don't.

THE COURT: I don't either.

Q Do you recall a representation having been made by BMI counsel to the effect that in order to induce a BMI affiliate to license CBS directly in those circumstances, it would be necessary to pay the affiliate more than he would receive from BMI?

THE COURT: Just a minute, Mr. Cramer.

MR. TOPKIS: I object, your Honor. This isn't a memory test.

THE COURT: It isn't a memory test but I don't even think it is--I don't see what it will prove if the representation was made by counsel. We have a witness here and you can ask the witness his opinion and his views and so on and I would want a reference to that alleged representation.

So I could see whether I thought the significance of whatever was said was even relevant to the question to the witness here.

MR. TOPKIS: Isn't the question, your Honor, what facts the witness can testify to?

THE COURT: But he can be cross examined by asking him whether he agrees or disagrees with something his own lawyer said at an earlier time.

What I am bothered about is not whether that is a logical method of proceeding but whether the material that Mr. Hruska is relying on does indeed contain the significance which he attaches to it.

MR. TOPKIS: Exactly, your Honor. Confront him with it. Is that not the proper course?

THE COURT: That would be a proper course.

MR. HRUSKA: The document is in front of Mr. Cramer and to make the record complete--

THE COURT: You talked in terms of representations. I don't know whether you made a statement made in a brief.

MR. HRUSKA: Yes, your Honor.

THE COURT: That's something different in my mind than a representation. A representation is normally a statement as to a fact.

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MR. HRUSKA: Then I misused the word. This was a statement as to a judgment.

THE COURT: Then we are right back where we were with regard to my ruling in the first place. I don't think that questioning Mr. Cramer on the basis of the brief is the right way to proceed.

Ask him what his opinions are and then you can show, if you want at a later date, they are inconsistent with the brief, if I agree with you that the brief says what you say it says.

I am not disagreeing either. I just can't sit down and interpret at this moment.

MR. HRUSKA: Your Honor, I think it will just take too long and I will not pursue this line of questioning any further.

THE COURT: Get whatever information you want from Mr. Cramer now.

Q Do you see any difference, Mr. Cramer, between the per use proposal made by CBS during the course of the BMI motion for a preliminary injunction on the one hand and the present per use proposal on the other hand, which would make true in 1970 a statement that CBS cannot hope to persuade any BMI affiliate to license directly unless it proposes to pay more than BMI would and make that statement un-

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true under the present per use proposal?

MR. TOPKIS: Objection as to form, your Honor. I don't understand that question and I certainly don't remember what the 1970 proposal was. And I don't think that's before the witness.

MISS KEARSE: It's gone through several changes of life since then, your Honor.

THE COURT: Did you have anything to do with preparing the brief in 1970, Mr. Cramer?

THE WITNESS: I may have discussed it but I didn't really prepare that brief.

As I testified a few minutes ago, I have no recollection of the circumstances involved here. I didn't know exactly what was involved.

THE COURT: I don't think questions along this line will be fruitful. You are asking him to account for other people's statements.

Q Did you make it a practice during the course of this case to read and approve briefs by counsel submitted on behalf of BMI?

A Sometimes yes and sometimes no.

Q And you have no specific recollection as to whether you read the brief we have just been talking about prior to its submission to the Court?

A I have no recollection of that and, as I said for the third time, I don't recall exactly what the proposal was in 19--whatever it was, '69 or '70.

THE COURT: All right.

We might as well break now if you are starting on a new subject.

MR. HRUSKA: I will be starting on a new subject, your Honor.

THE COURT: All right, we will adjourn until 2 o'clock.

(Luncheon recess until 2 o'clock p.m.)

AFTERNOON SESSION

2 p.m.

E D W A R D C R A M E R, resumed.

CROSS EXAMINATION (Continued)

BY MR. HRUSKA:

Q Mr. Cramer, I would like to show you PX 433 and 434 which are in evidence in this case as respectively the BMI writer payment schedule and the BMI publisher payment schedule as of September 1968.

My question is, does BMI have writer and publisher payment schedules which are more current than those two exhibits?

A Yes.

MR. HRUSKA: Your Honor, this is probably as good a time as any to refer to the fact that we did subpoena, issue a subpoena for the more current BMI writer and publisher payment schedules and we would like to put those in, if they can be produced.

MISS KEARSE: They can be produced, your Honor. I object on the ground that they are not relevant.

THE COURT: What is the purpose of their introduction?

MR. HRUSKA: Your Honor, these schedules show not only the per use payments which BMI makes, and I think

the fact that BMI does make distributions on a per use basis independently--

THE COURT: You mean is an element in the distribution?

MR. HRUSKA: Right, your Honor. It also shows the bonuses, describes the formulae for the computation of bonuses for BMI members which I think is a point of some relevance to the Section 2 aspects of the case.

If your Honor would like me to explain that further, I would be happy to do so.

THE COURT: Yes. Would you?

MR. HRUSKA: The bonus system offered by BMI is a part of the payment structure that any new organization would have to compete with and may be argued by us to be a barrier to entry, which is relevant to the Section 2.

THE COURT: I think that is enough to get under a very high writer.

I'll allow the documents to go in evidence.

Do you have copies of the new ones with you?

MISS KEARSE: We have copies of the documents. These were subpoenaed in May, is that correct?

MR. HRUSKA: Yes.

MISS KEARSE: I have documents that comply with that subpoena.

THE COURT: Do you want to substitute those for the older documents?

MR. HRUSKA: No, I think, your Honor, we would like to--

THE COURT: Use a different number?

MR. HRUSKA: Miss Kearse's statement, I don't know whether it intended to imply that there are today payment schedules which are even more recent than those existing in May but if there are, I think to complete the picture on what these payment schedules have been since 1968, those would be relevant.

THE COURT: Have they changed since then, too?

MISS KEARSE: I don't know, your Honor. Maybe we could just automatically supply copies of every new thing that comes along every day.

I mean, this is ridiculous.

THE COURT: It isn't all that ridiculous for me to know just what payments are made by the two licensing organizations to their members and affiliates and the history of that may be relevant too but I don't want to burden you at the moment.

Will you please give Mr. Hruska what you have which I understand you to believe, at least to your knowledge, is the most recent.

MISS KEARSE: It was when the subpoona was served.

THE COURT: You weren't suggesting there was anything newer?

MISS KEARSE: No.

THE COURT: Do you know if there is anything new since May of this year, Mr. Cramer?

THE WITNESS: I believe those are the latest ones.

MR. TOPKIS: Your Honor, I could I guess note this -- I certainly defer cheerfully to your Honor's suggestion that it would be perhaps useful to know how much BMI pays as part of general background but to any suggestion that whatever payments BMI makes, whether by way of bonus or Shulte's cigar store coupons, to suggest whether that has anything to do with the Section 2 issue, I must respectfully dissent.

I don't know how to answer it. If it is pertinent, I can't conceive what I am supposed to do by way of response and, that being so, I submit that it is irrelevant to any Section 2 claim unless it might be suggested that BMI pays $5,000 per three seconds of music or something like that, but that's not the suggestion.

So, to any suggestion that it has anything to do with Section 2, I dissent.

THE COURT: I understand.

I may well reach that conclusion, Mr. Topkis.

MR. TOPKIS: Well, it is not your reaching the conclusion that concerns me, your Honor. It is the impossibility of my responding to it. It concerns me and urges me now to rise and ask your Honor to rule on that precise point.

THE COURT: If I must rule on that precise point, for the moment I'll rule that it may be relevant. I can't quite see the thing as clear cut apparently as either of you can or do but it does seem to me that the question of the ease in entry which is a subject to which Mr. Hruska has alluded is always relevant in a claim of an attempt to monopolize or actual monopoly and while I am in my own mind quite skeptical of the weight which this evidence has, it does seem to me that it might have some bearing on the subject.

MR. HRUSKA: I think necessarily your Honor must be skeptical because there hasn't been any full presentation of this point. We are not at the stage of writing briefs and if we were to stop with every piece of evidence and make a full-scale analysis of where it fits into the picture, we would obviously be here forever.

THE COURT: Haven't we been?

MR. TOPKIS: Well, it seems that way.

MR. HRUSKA: To all of us.

THE COURT: I suggested that you substitute those

for the older exhibits although you want to keep the history?

MR. HRUSKA: Yes, your Honor.

I would like to mark the writer payment schedule as PX 469 and the publisher schedule as PX 470.

THE COURT: They are received in evidence.

xx (PX 469 and 470 received in evidence.)

THE COURT: That is May 1973?

MR. HRUSKA: Well, the date on the exhibits themselves is September 1972.

Q Now, Mr. Kramer, are there any business reasons why BMI takes exclusive rather than nnn-exclusive rights from its affiliates?

MISS KEARSE: Objection, your Honor. Any questions having to do with exclusive rights taken by BMI from writers and publishers, it seems to me, is flying in the face of our stipulation here. We have a stipulation which governs the accessability of writers and publishers to CBS.

MR. HRUSKA: This is an intent question, your Honor, to which this last question is addressed. One of the elements of a Section 2 case is deliberation. The deliberation with which monopoly power was acquired. The issue being whether it is acquired deliberately or through skill, foresight and industry. That is the normal distinction made by the Courts.

I quite agree with Miss Kearse regarding the stipulation in general. Here we are not talking about the effect, we are talking about the intent. Is there a business reason for taking exclusive rights. It is being offered only on the Section 2 point.

THE COURT: It is not being offered with regard to the bypass as such?

MR. HRUSKA: That is right, your Honor.

MISS KEARSE: I would like to point out there was no direct testimony at all with respect to what Mr. Hruska is now trying to put on in his Section 2 case. This is completely beyond the scope of direct.

THE COURT: I think it is beyond the scope of direct. We are getting to the very last few days, thank goodness, and I think the way to handle that is for Mr. Cramer to be your witness on this subject matter if you want to ask him these questions.

MR. HRUSKA: I agree, your Honor.

THE COURT: All right.

THE WITNESS: As I understand it, the question is is there any business reason for an exclusive grant to BMI?

THE COURT: I believe that is the question.

Q That is the question, yes.

A Well, under the decree, the copyright owners, writers and publishers have a right to grant direct licenses so although they may be exclusive, we treat them if anybody asks just as if they were non-exclusive.

I have been with the company now as chief executive officer close to six years and that was never a consideration in my time when the licenses -- when the contracts were drafted, whether they should be exclusive or non-exclusive.

Q Has BMI ever had occasion to grant permission under the BMI consent decree to direct licenses?

THE COURT: Will you repeat that?

Q Has BMI ever had occasion to grant permission under Section 4 of the BMI consent decree to direct licensing by its members? That is, direct licensing to users making direct performances to the public?

A Well, to the best of my knowledge we were -- since I have been there we have never been requested to issue such a license so having never been requested, we never granted one.

What happened before I can't really say.

THE COURT: I am confused because I am not sufficiently familiar with the terms of the consent decree that you are both talking about. And Mr. Cramer talks about the fact that under the decree the writers have a right to license directly and Mr. Hruska talks about the question of BMI giving consent. Which is it?

MR. HRUSKA: Your Honor, will you take a look

at Section IV of the BMI consent decree.

THE COURT: You are enjoined from failing to grant permission. You regard that as their having the right and Mr. Hruska puts it in terms of your granting permission.

THE WITNESS: We are talking about the same thing, your Honor.

MR. HRUSKA: I think so, except for the other limitations in that Section IV limitations as to specific performances --

THE COURT: We are getting too far afield for my inquiry. I wanted to know why you approached it in different ways. Now I understand that.

Q Mr.Cramer, I understand that there may be some disagreement between us regarding the meaning of Section IV of the BMI consent decree, so let me put the question this way: Would there be any business reason why BMI would take exclusive rights from its members, assuming that it in fact did take exclusive rights from its members?

THE COURT: Sustained. First of all, it is an hypothesis on an hypothesis, but even an hypothesis in this situation doesn't mean anything. I am perfectly willing to hear why what has happened has happened and how it works, but I think that is the limit of it.

Q Have you, Mr. Cramer, talked to ASCAP writer members during your term of office with BMI --

THE COURT: To ASCAP members?

MR. HRUSKA: Yes, sir.

Q -- regarding those writers leaving ASCAP and becoming members of BMI?

A A minor change in the terminology. BMI doesn't have members as such. We have affiliates --

THE COURT: Just a minute. Miss Kearse?

MISS KEARSE: I want to object on the grounds of relevance and I object to the continued going beyond direct examination.

THE COURT: As to this line of questioning, I have ruled that Mr.Cramer is Mr. Hruska's witness.

MR. HRUSKA: And that will be true, your Honor, for -- this is the next to the last area that I mean to cover and I think I will cover both of them very briefly.

A The answer is no.

Q Are you familiar with discussions that have been held between your subordinates at BMI on the one hand and ASCAP writers or business agents or lawyers for those writers on the other hand on the subject of those writers becoming affiliates of BMI?

A I don't know what the term "familiar" means, but

I do know that discussions have been held between members of my staff and ASCAP members about changing affiliations.

Q Have you become involved in the question as to the amount of guarantees which might be offered those ASCAP writers as an inducement to have them become affiliates of BMI?

A I don't know if the term "guarantee" is appropriate. I don't know if we offered guarantees to them.

Q Guaranteed advances?

A We may offer them advances. Yes, the terms -- to expedite matters, occasionally the terms of the advances to these writers are discussed with me.

Q Aren't some of those advance monies which the writer can keep even if his level of distribution based on useage does not rise to the level of the advance?

MR. TOPKIS: Objection, your Honor.

THE COURT: Sustained.

Q Does BMI in dealing with ASCAP writer members in this conext have any rule of thumb regarding the amounts which ASCAP members will lose as a result of terminating their membership in ASCAP?

MR. TOPKIS: Objection.

MR. HRUSKA: We have had testimony, your Honor, I think from both sides, CBS and ASCAP, regarding the question of barriers to entry vis-a-vis ASCAP and Mr. Cramer, or Mr. Cramer's organization certainly, has to deal with the question on, I would think almost a daily basis, having writers leave ASCAP and join BMI. Surely the barriers presented to BMI in obtaining members from ASCAP would apply, I think a fortiori, to any new organization that attempted to obtain members from both ASCAP and BMI.

THE COURT: Do you want to say something on that? I am prepared to rule.

I do accept the fact since the economists on both sides have talked about the questions of difficulties of and ease of going from one organization to another or being lured

out of an organization, that whatever Mr. Cramer knows as an actual participant in the scheme or being familiar with the process may be relevant but as to your particular question, I am not sure what it means and although I have often said that it isn't important whether the lawyers understand what it means, it is important that the Judge understand what it means.

Would you read it back, please. I am overruling the objection to the line but not necessarily the question. I want to hear the question.

(Question read.)

THE COURT: You mean do they have a rule of thumb in computing what amounts they will lose?

MR. HRUSKA: Yes, your Honor.

MR. TOPKIS: I object to that, your Honor. How can this witness know or pose as an expert on how much ASCAP members lose? He may be right, he may be wrong but his testimony will not prove it. And in consequence, if the fact in probandum is how much they will lose--

THE COURT: I don't think his answer can possibly bind ASCAP.

MR. TOPKIS: That's all I care about.

THE COURT: Whatever it is, it may give me some light on what the attitude of BMI is in trying to induce

ASCAP people to join their organization.

Do you now recall the question?

THE WITNESS: Yes.

THE COURT: Do you have a rule of thumb in--

THE WITNESS: The answer is no, your Honor.

THE COURT: I wish you said that a long time ago.

THE WITNESS: I was sitting here trying to do that.

Q What do you know about what--if anything, about what ASCAP writer members under the Four Fund System will lose in terms of deferred compensation as a result of leaving ASCAP?

THE COURT: Is the question what does Mr. Cramer personally know?

MR. HRUSKA: Yes.

MR. TOPKIS: Objection, your Honor, there is no compensation under the Four Fund System. The question is objectionable as a matter of form.

THE COURT: I will sustain the objection to the form and ask Mr. Cramer, do you have knowledge and if so what knowledge do you have about what the effect on an ASCAP member who is under the Four Fund System would be in leaving ASCAP?

THE WITNESS: No.

Q When you were practicing law, Mr. Cramer, and representing ASCAP writers, did you ever have occasion to consult with an ASCAP writer or a representative of ASCAP regarding the possibility of that writer leaving ASCAP and joining BMI?

THE COURT: I think we are getting awfully close to privileged material when we ask a lawyer what he had to do with a client's affairs.

MR. BRUSKA: We may be able to end that very quickly, your Honor, by saying no.

THE WITNESS: May I have that question read back to me.

(Question read.)

THE WITNESS: The answer is no and I think I said earlier this morning that I had no relationship with writers and publishers in their dealings with BMI at that time because of the possible conflict so this is one area that I did not get into at all.

Q Are you aware of any studies made by BMI as to the amount of BMI music used on CBS, NBC Television Network and the ABC Television Network?

A Yes.

Q Do you know what the ranking of those three networks is with respect to useage of BMI music?

In other words, which uses the most, the next and the third?

A That fluctuates from season to season, from week to week depending upon what shows are on for that particular period of time.

So I cannot give you an answer as of today which network uses more or different kinds of music used on various networks.

Q Do you recall what the situation was in 1969?

A Whether '69 or '70, I have a general recollection. I don't have the date in front of me. I haven't seen it in years but I do have a vague recollection of what it was.

Q Could you tell us what that recollection is?

MR. TOPKIS: Your Honor, isn't this the worse possible way to get this evidence?

THE COURT: It is not the worse. It is along the way.

MR. HRUSKA: Very close to it. I am forced to agree with that, your Honor.

THE COURT: In fact I have just written in my notes that the witness has a vague recollection--of that point I mean, Mr. Cramer.

THE WITNESS: Thank you.

MR. BRUSKA: We have no further cross examination.

MISS KEARSE: No redirect, your Honor.

THE COURT: Thank you very much, Mr. Cramer.

(Witness excused.)

MR. DAVIDSON: I call Mr. Paul Rosenthal as my next witness.

xx PAUL ROSENTHAL, called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows:

xx DIRECT EXAMINATION

BY MR. DAVIDSON:

Q Mr. Rosenthal, by whom are you employed?

A Broadcast Music, Incorporated.

Q What is your job title?

A Manager, Logging and Clearance Department.

Q Could you briefly describe your duties for us?

A I supervise the preparation of logs, cue sheet, scheduling of the work, flow into the system.

Q What are logs and cue sheets?

A Logs are the documents submitted by various radio stations, television stations. The cue sheets are the actual music used of a show, TV show. Feature film.

Q Are logs typically used in certain kinds of shows

and cue sheets with other kind of shows?

A Yes.

Q How would you describe the differences?

A A feature film would be the actual log from a cue sheet, whereas a live variety show would come off a log itself.

THE COURT: Say that again? What about a feature film?

THE WITNESS: A feature film shown on the TV would be the actual log.

THE COURT: And you say a variety show--

THE WITNESS: Would be recorded subsequently on the log itself.

THE COURT: Now, I don't doubt that is all true but I still find it a little difficult as an outsider to envisage how this works.

Do you by any chance have with you an actual log and a cue sheet that you could show me so I can envisage how these things work?

MR. DAVIDSON: I think we have some logs, your Honor, that we intended to produce at a later time.

THE COURT: All right.

Can you describe in more detail, Mr. Rosenthal, just how the process works? How does the logging and the--

THE WITNESS: The members of my staff, your Honor.

THE COURT: And they watch the show, for example?

THE WITNESS: Oh, no, sir. A log is submitted, in this case from CBS, showing what was presented.

THE COURT: What has already been presented.

THE WITNESS: Yes, for a given period of time. For the month. We in turn--

THE COURT: If they do that, what do you have to do, or your staff?

THE WITNESS: We start to extract the musical con-

tent for identity from the log itself and if the name of a feature film is presented--

THE COURT: You mean they give you a log of everything that has happened.

THE WITNESS: Yes, sir.

THE COURT: And then you take the music off, the BMI music?

THE WITNESS: Yes.

THE COURT: And the cue sheet, what?

THE WITNESS: The cue sheet, in order to get the musical content of the feature film or a TV film series, you know, we go to a cue sheet that is generally submitted and we will start to extract the musical content from that.

MR. HRUSKA: I think that the record probably reflects the fact that cue sheets are submitted by producers of programs to networks and networks resubmit them to the licensing organizations.

That is done on filmed series, generally.

And logs made up with respect to variety programs for example are prepared by the networks. I think that is reflected in the record.

MR. DAVIDSON: I will ask that there be marked for identification as BX 1 and BX 2 these two documents.

(BX 1 and 2 marked for identification.)

xx

Q Mr. Rosenthal, I show you BX 1 and BX 2 for identification and ask if you can identify them.

A Yes, I can.

Q What is BX 1?

MR. HRUSKA: Your Honor, before we have testimony on this, could we wait until we find our copies of these exhibits out? We were not given any notice, perhaps because Mr. Davidson did not think he was going to get into this subject, that these documents would be used and it may take a moment until we can get copies of them.

THE COURT: If it just takes a moment, I can't see that we need really for a man to say this is a cue sheet or this is a log.

Let's go ahead and if there are problems, you can ask a few extra questions on cross.

A BX 1 is a log sheet.

BX 2 is a cue sheet.

MR. DAVIDSON: I think, your Honor, in view of CBS' problems, I'll defer offering them but I would ask leave to hand them up to your Honor so that your Honor can have an idea--

THE COURT: Do you have any objection to my looking at them?

MR. HRUSKA: No, certainly not, your Honor.

THE COURT: Thank you.

Q Mr. Rosenthal, during the course of your duties have you become familiar with the music logs and cue sheets which are submitted to BMI by CBS Television Network?

A Yes, I have.

Q Did there come a time when you made a study of feature use of BMI music on CBS Television Network?

A Yes, I did.

Q What period was covered?

A March of 1972.

THE COURT: The month?

THE WITNESS: Yes, sir.

Q Now, in terms of the types of programming aired by CBS during that month, would you describe that month as typical?

A Yes, I would.

MR. HRUSKA: Your Honor, I move to strike that last answer because I don't believe there's been any foundation laid for an opinion by the witness that this was a typical month but, more importantly, we are now going to commence, obviously, a series of questions about this document which we received I think last week but we have a number of objections to

THE COURT: Is that the study?

MR. HRUSKA: That's the study, yes. We have a number of objections to this document.

Let me mention one at the moment because I think it is dispositive and that is it appears on the face of the document that it will be offered on the bypass question and it seems to me that this is clearly an example of evidence which is precluded by the stipulation.

THE COURT: Well, you may be right but you are anticipating.

Is this to be offered on the bypass question, Mr. Davidson, and is it offered?

MR. DAVIDSON: Well, there was testimony from Dr. Fischer to the effect that CBS, in order to take a per program license and operate under a per program license, could only use that per program license for very few programs if it were to save money by going that route and this document would tend to indicate that there are very few programs which they would require the per program license on.

MR. HRUSKA: The question of bypassing a blanket or bypassing a per program, those are both questions to which this stipulation applies and the obtainability of BMI music is, by virtue of the stipulation, going to be governed by your Honor's determination on the obtainability of ASCAP's.

THE COURT: I've never understood--wait now.

I take it, Miss Kearse, perhaps you should be the spokesman.

First of all, will somebody hand me an actual copy of the stipulation?

While I hunt for the text of it, Miss Kearse, I would like to know, am I correct in understanding that the stipulation does have the effect of, I won't say requiring the Court, but enabling the Court to--just a moment. Maybe I can find it and ask the question properly.

MR. HRUSKA: I have a copy, your Honor. It is my only copy, however.

THE COURT: Thank you. I'll give it back to you.

I must admit I am in a state of confusion at the moment, but anyway, to try to clarify the thing as well as I can, there is no doubt, is there, that the effect of the stipulation is that if I decide that it is impractical for CTN to obtain programming directly from ASCAP members, that finding is binding on BMI.

MISS KEARSE: Yes, sir.

MR. HRUSKA: Yes, that is true.

THE COURT: Now, what difference does it then make as to whether there are certain special aspects of the BMI situation? Doesn't that subject, insofar as BMI is concerned, depend on the proof in relation to the practicability or

impracticability of CTN obtaining music programming directly from ASCAP members?

MISS KEARSE: Yes, your Honor. So far as the feasibility of acquiring direct licenses but this study goes beyond that.

This goes to the question of the per program license possibilities which is another aspect of the present system and Dr. Fischer had some testimony as to why he thought the per program license was not a reasonable way to proceed and that is a different question.

MR. HRUSKA: May I answer that.

THE COURT: Yes.

MR. HRUSKA: The per program license has been proferred in this case simply as another way of bypassing.

In other words, take the per program license and bypass by that route.

Also, your Honor, it is perfectly obvious and let's put this to the test--if BMI has an argument that we could somehow achieve all of our objectives with a per program bypass, then of course that--

THE COURT: I don't know why you call it a bypass. Per program system, let's call it.

MR. HRUSKA: Well, the idea of it, as I understand the point on which it is supposed to be relevant, the idea of

it is that we take a per program license which we use for a very limited number of programs and then we avoid paying the per program fee to BMI or to ASCAP by directly licensing all the other use for all the other programs.

That I believe is the point of this offer. That in effect is a form of bypass.

Now, if this form of proof were to go in, this would, of course, reraise and bring in the elements on the Section 1 point, the exclusivity provision of the BMI consent decree, which is one of the very things that Miss Kearse has been saying we shouldn't get into on the Section 1 issue because, obviously, if BMI has exclusive rights, then even if you took a BMI per program license and even if that license had a provision in it permitting direct licensing, you couldn't do it because BMI had the exclusive rights.

THE COURT: Are you talking about putting in evidence in relation to a proposed system that would be partly per program, but substantially direct licensing or are you talking about putting in evidence on a combination of blanket licensing and per program licensing, and what is the further relevance of the proof with regard to per program licensing?

MISS KEARSE: First of all, your Honor, the per program license does not bypass BMI. That is a license from BMI.

THE COURT: I already indicated that I understood that, yes.

MISS KEARSE: If there is a body of CTN progrfams for which that would be appropriate, then CBS can do whatever it will with respect to the other programs. If it wants to get direct licenses, fine, if it wants to use all ASCAP music, well, that is another alternative, but this is not solely a bypass question.

THE COURT: I am prepared to rule here that I will hear the evidence and I will consider it with regard to matters that do not relate to the practicality or impracticality of CTN obtaining programing directly from ASCAP or BMI members, which I understand to be the subject matter covered by the stipulation, and I think that takes

care of your problems.

I think it takes care of Mr. Hruska's, too.

If later on BMI attempts to show that as a result of being able to go on a per program basis the necessary or more favorable consequences that you can also bypass, you will be free to argue that that falls afoul of the stipulation but I don't understand that to be the purpose.

MR. HRUSKA: For the record, then, your Honor, let me interject the other objections I have to this exhibit and the line of inquiry based on the exhibit.

Number 1 deals with one month in 1972, March. I think that is entitled to so little weight that it is not relevant.

THE COURT: On that I rule that I will accept it, but you can bring out its limitations on cross-examination.

MR. HRUSKA: Right.

Secondly, I think 1972 is not the key period here and in talking about a system permitting direct licensing, whether it is bypass or per program bypass --

THE COURT: I make the same ruling.

MR. HRUSKA: And thirdly, this study purports

to be based on 631 logs for the month of March, 1972. The study, I believe --

THE COURT: Mr. Hruska, the general nature of your objections you are now making it seems to me clearly go to the weight of the evidence and not its admissibility and if you can destroy the value of the report on cross-examination, you can move to strike it, perhaps, but there is no point in expecting me to be able to rule on these issues in advance.

I haven't even seen the study or heard anything about it.

MR. HRUSKA: I understand that, your Honor.

My last point was that we are not equipped to destroy this on cross-examination or do very much about it, because we just got it last week and, as I say, it is based on 631 logs and we certainly have not had the opportunity to review 631 logs between the time we got the document and today.

I might say I believe this document was probably prepared far earlier than the time it was given to us.

THE COURT: If you are asking for further time to cross-examine the witness --

MR. HRUSKA: That may be necessary after we have the time to review the logs on which it is supposedly based.

THE COURT: I expressly rule that you have the right to raise that question hereafter.

Q Mr. Rosenthal, how did you go about making the study?

A We took March, theCBS logs for the month of March, and we listed day by day each of the shows broadcast for that time period.

Then we started to, as we went down the line of a log, show by show, determine whether there was any BMI feature use.

Q Did any other persons assist you in making the study?

A Yes, they do.

Q Who were they?

A Mr. Feilich, Mr. Kenney and Mr.Arthur.

Q I show you a document which has previously been designated 167, although it has not yet been marked, and ask you if you can identify it.

A Yes. This is the survey we did.

THE COURT: We will mark it for identification at this time.

(BX167 was marked for identification.)

MR. DAVIDSON: Would you like to see a copy of it?

THE COURT: Are you going to offer it or question the witness about it?

MR. DAVIDSON: I will offer it.

MR. HRUSKA: I would object to its being offered at this time until we have had a chance to go over it.

THE COURT: I think it is better for me not to look at it until you have laid a firmer foundation for its admission, at least if I can understand the questions concerning it without it.

Q Mr. Rosenthal, I ask you to direct your attention to that part of BX167 which appears after the first three pages. I ask you what those further pages are?

A These are the actual work sheets that we did the survey.

Q What is the information listed in the column on the first column which is completed?

A That is the actual name of the series or show.

Q And what is the information entered in the column headad BMI?

A That is the yeses and noes, pertaining to whether they were BMI feature music or not, used on that show.

Q I ask you to turn to the work sheet for March 2 and directing your attention to the asterisks appearing in the last column, what does that indicate?

A That indicates that there was BMI feature music and the use was of an instrumental background.

Q On any particular type of program?

A Yes, that was a soap opera.

Q Were asterisks placed by any other programs other than soap operas?

A No.

THE COURT: Why did you use asterisks for soap operas?

THE WITNESS: No particular reason, your Honor.

THE COURT: Just your way of showing that is what that meant?

THE WITNESS: Yes.

MR. DAVIDSON: I think the witness may have misinterpreted the question. He did indicate that that indicated that it was just instrumental background use for features.

THE WITNESS: Oh, yes.

THE COURT: Well, every time there was just an instrumental feature use such as you described, did you have an asterisk or was that the only instance in the whole month? I mean an asterisk normally refers to something exceptional. That is why I asked --

THE WITNESS: No. Any of the soap operas that had BMI feature use that with instrumental background. I put in an asterisk.

Q You only examined the soap operas to determine whether the features used on them were instrumental background?

A That's correct.

Q I ask you to turn to the third page of BX167 and I ask you what that represents?

A That is a summary, actually, of the survey.

Q And what do the first two pages of BX167 represent?

A That is the way we did it. The method that we used in preparing it.

Q Do those two pages accurately set forth the methods which you used?

A Yes, sir.

THE COURT: You mean as a description of the method?

THE WITNESS: Yes, sir.

Q Mr. Rosenthal, what is the nature of background use of music on soap operas?

A Generally for dramatic effect. An organist playing some piece of music.

MR. DAVIDSON: Your Honor, I would like to offer BX167 in evidence.

MR. HRUSKA: We object, your Honor, for the reasons I stated before.

THE COURT: Those objections are overruled subject to the reservation I made that if you need extra or further time to cross-examine the witness on the basis of an examination of the 31 logs, I will give it serious consideration.

MR. HRUSKA: Yes, your Honor.

May I ask that the exhibit not actually be received in evidence until we have had an opportunity to check that -- check these logs and determine the accuracy of this. And cross-examine --

THE COURT: I will receive it at this time. You can always, on the basis of whatever comes to your attention, ask me to strike it.

MR. DAVIDSON: I have no further questions of Mr. Rosenthal.

CROSS-EXAMINATION

BY MR. HRUSKA:

Q Mr. Rosenthal, when was this study completed?

A I believe during the summer of this year.

Q Do you know of any reason why this document was not given to us at the time it was completed?

A No, sir.

MR. HRUSKA: I would like to reserve cross-examination, until, your Honor, we have had a chance to explore this backup.

THE COURT: Have you concluded your direct examination?

MR. DAVIDSON: Yes. I have one question on redirect now.

REDIRECT EXAMINATION

BY MR. DAVIDSON:

Q When was the examination made as to which soap opera uses were solely instrumental background?

A Just a few days ago.

MR. DAVIDSON: I have no further questions of Mr. Rosenthal.

I would ask the clerk to mark it.

(BX167 was received in evidence.)

MR. HRUSKA: Your Honor, may I ask -- I may have been too quick to close on Mr. Rosenthal.

FURTHER CROSS-EXAMINATION

BY MR. HRUSKA:

Q YOu said on direct examination that March 1972 was a typical month. What study have you conducted to enable you to determine that March 1972 is, in fact, typical?

A I would say just the experience with the logs themselves over a good number of years.

Q But you haven't made any specific study for the purpose of determining how typical March 1972 is?

A No, sir.

MR. HRUSKA: Thank you.

THE COURT: When you say "typical," Mr. Rosenthal, what do you mean by that word?

THE WITNESS: Well, your Honor, there were no major political events, no Appollo shots, no rocket launches that would preempt a large portion of a daily program.

THE COURT: So you mean --

MR. HRUSKA: That may be atypical, your Honor.

THE COURT: That is arguable but I want to know what the witness means.

So you mean there were no special everts which in your opinion created an abnormally great or small use of music by CTN during that month?

THE WITNESS: That is correct, your Honor.

THE COURT: Mr. Rosenthal is excused at this time.

(Witness excused.)

MISS KEARSE: Your Honor, I would like to call Peter Steiner to the witness stand.

MR. HRUSKA: May we go off the record for one moment, your Honor?

THE COURT: Yes.

(Discussion off the record.)

P E T E R O. S T E I N E R, called as a witness on behalf of BMI, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MISS KEARSER:

Q Professor Steiner, where are you employed?

A At the University of Michigan.

Q What is your title?

A I am professor of economics and law.

Q Are you also chairman of the Economics Department?

A Yes, I am.

Q Would you tell us, please, about your educational background including whatever degrees you have received and from what institutions?

A My undergraduate work at Oberlin College, received the A.B. degree, magna cum laude.

Q What year?

A That was 1943. A master's degree in economics from Harvard in 1949, and a Ph.D. in economics at Harvard in 1950.

Q What was the title of your Ph.D. thesis?

A Workable competition in the radio-broadcasting industry.

Q Have you published articles on the broadcasting industry?

A Some.

Q How long have you been teaching economics?

A Since 1949.

Q How long have youbeen onthe faculty of the University of Michigan?

A This ismy sixth year.

Q When did you become chairman of the economics department?

A Three years ago.

THE COURT: Excuse me for asking, but since it has been raised, is that a rotating post of chairman or -- I know in some universities it is more of an administrative post than it is a matter of standing. I don't doubt

that you are the best ecnnomist this side of the Mississippi--excuse me, Dr. Fisher. I do want to know what the chairmanship means?

THE WITNESS: It is an administrative and rotating chore.

Q Where did you teach before joining the faculty of Michigan?

A I was a teaching fellow at Harvard from 1947 to 1949. I taught at the University of California in Berkley from 1949 to 1957.

I taught at the University of Wisconsin, Madison, Wisconsin, from 1957 to 1968.

Q Can you tell us some of the subjects you taught?

A It has been largely in three areas. Industrial organization, economic theory, and statistics.

Q Have you received any fellowships?

A Yes.

Q What were they and when did you receive them?

A I had, what is called a faculty research fellowship of the Social Science Research Council in the mid-1950's. I think from '56 to '59. That is a three-year fellowship. I was a Guggenheim fellow during the year 1960-61.

I had a Ford Foundation faculty research fellow-

ship from what I think was 1965-66.

Q Are you a member of any professional societies?

A Yes. I am a member of the American Economics Association, American Statistical Association, and the Econometric Society.

Q Have you done writing in the field of economics?

A I have.

MISS KEARSE: I would like to ask the clerk to mark this BX168 for identification.

(Defendant's Exhibit BX168 was marked for identification.)

Q Professor Steiner, does that BX168 contain a reasonably complete list of your writings?

A I think it is complete as of about six months ago.

MISS KEARSE: I would like to offer BX168 in evidence.

MR. HRUSKA: No objection.

THE COURT: Received.

(Defendant's Exhibit BX168 was received in evidence.)

Q Professor Steiner, are you the co-author of a textbook on economics?

A Yes, I am with Richard Lipsey.

Q How widely used is that textbook?

A It is used in several hundred colleges in the United States and it is used in perhaps 30 countries that I know of besides the United States.

Q Have you recently broken the barriers to entry at a leading educational institution?

A I am glad you asked me that. It is being used this year at Harvard College for the first time.

Q And what textbook had Harvard used previously?

A It is a pleasure. I think for the last 25 years they have used the book by Paul Samuelson. Perhaps next year it will be used at MIT.

y Professor Steiner, let me ask you some questions about general economic principles and goals. What generally is the function of competition in the provision of goods and services?

A I think it is, to put it briefly, it is to provide for the efficient production and distribution of commodities that buyers want without artificial restrictions on the quantity supplied.

Q Is there more than one aspect to the concept of competition?

A Yes. It is a many splendored thing.

Q What are the various aspects of the concept of

competition?

A Let me mention three. There is, of course, price competition. Competition in the price at which a particular bundle of commodities are sold. There is second the commodity bundle itself. One might talk, for example, of the mix of particular goods or goods and services or products.

One might talk about, as I say, the mix. One might talk about the quality of individual elements in that mix. One might talk about the ancillary services that may be provided as part of that mix.

And third, I think is an aspect of -- another aspect of competition is what I think of as the transactional efficiency with which these bundle of goods are transmitted from buyers to sellers, from sellers to buyers.

That itself has several aspects. There is not only the cost of getting it delivered, if you are selling a commodity or providing a service. There is the speed with which it is done and the convenience and other related things.

Q How does competition affect such matters as price and quality and the efficiency of transactions?

A Wall, it works by giving buyers alternative sources of supply and by giving sellers alternative customers to dealing with.

In contrast to a situation, let's say, where a buyer faces only a single source of supply, has the choice of either taking the package or rejecting it. He can shop from one to another. He can choose that combination of goods, services, means of transmission, price. He can ch e the one that satisfies, best satisfies him and if buyers generally select one kind of outcome, that forces other sellers to provide that or to be shut out.

The other side of the market, I think, having many potential buyers as distinct from a single buyer gives sellers an opportunity to choose which buyers they want to sell a particular goods to. It is the interaction of buyers and sellers, if you like, that in theory incompetition lads them to arrive at a market determination of, concerning the exchange of these goods and services on terms acceptable to both.

Q And what is meant by price competition?

A May I say what price competition means to me?

Q To you as an economist.

A I regard price competition as being the existence of alternative sources of supply, of sufficient alternative sources of supply to constrain the price that is charged.

Q Can price competition exist if only one price is quoted in a given situation?

A Yes, it can.

Q How is that so?

A It is not the number of prices that are quoted. It is the number of alternatives from which the buyer can choose. May I give you an example. From the testimony, I think it was Mr. Vincent who suggested that when he produced the Jim Nabors Show, he offered the package to CBS at a price and, as he said, they bought the price. Apparently offered them a single price and they accepted it. I regard that as a transition, nevertheless, that had price competition because CBS had alternative programs they could choose from and alternatives to which they could turn.

Q Professor Steiner, are you familiar with the subject matter of this lawsuit?

A I think so.

THE COURT: Would you tell me what it is about, Mr. Topkis? You want to know what it is about too?

MR. TOPKIS: I have been dying of curiosity which has been ill-concealed.

MR. HRUSKA: I think that is the major defense in this case, your Honor. The defendants profess they don't understand it.

Q Have you read the trial transcript in this case?

A Virtually all of it.

Q Have you read the testimony of Professor Franklin Fisher?

A Yes, I have.

Q Professor Fisher testified that there are two markets involved in this action. One, a market for a BMI blanket license and the other, a market for an ASCAP blanket license.

Do you agree or disagree with that view?

A I disagree.

Q And why is that?

A Because I think that Professor Fisher confuses a transaction in the market with the market itself. I think the market is the market for music performance rights and I think that a particular license is a transaction in that market.

Q What wouldyou say are the commodities involved in the present market?

A Let me mention three without thereby saying there may not be more.

I think people in that market are buying, to look at it from the buyer's point of view, in the first place, rights to the anticipated performance rights.

These are to the anticipated uses of music.

I think, second, they are buying or may be buying or may wish to buy the rights to flexibility in that choice, to last minute changes, to short notice uses.

And third, I think they are buying the right to, what have been called in the trial record, spontaneous uses of music which I would regard as buying protection against infringement suits due to unexpected or spontaneous use of music.

I think in a very real sense all three of those services are involved in the transactions that have characteristically occurred in this market.

Q How would you describe these three types of uses in terms of the possibility of negotiating for performance rights in advance?

A I think the first kind of these is very easy to negotiate. Obviously a negotiated right to music uses that are anticipated well in advance create no problems for me.

With respect to the second kind, the short short term change, it really depends on how long the negotiating process changes and if there are some kind of negotiations that can't be done within two hours, then those rights can't be negotiated for.

Some within two days and so on. There is, I think, a spectrum of what we mean by short notice uses.

And finally, if the uses are genuinely spontaneous and live broadcast, I think there is no way of purchasing those in advance except by means of some sort of a blanket license or by some sort of infringement insurance, if that's a possibility which I haven't heard about in this context.

Q What do you see as the role of BMI and ASCAP in this market?

A I think they are two of the middlemen institutions that have developed in the market that connects the copyright holders and the principal users of those copyrights. They are two among many, I may add. I understand people like

Bernard Brodey, Harry Fox Agency and others, they are also middlemen in some sense, effecting these transactions or helping to effect them.

Q Have you formed an opinion as to whether or not the blanket license from ASCAP or BMI is the only mechanism by which a music user such as CTN can obtain the commodities that are involved in this market?

A Yes, I have.

Q What is that opinion?

A It is not in my view the only means.

Q What other presently existing means are there?

A There are several.

One, of course, is the direct licensing of performance rights.

Second is the per program license or is a per program license.

Third, there is the possibility of some combination between a per program license and direct licensing.

Fourth, I suppose there is the possibility of setting up a new intermediate institution to attempt to collect clearances. It seems to me there are a great variety of presently available techniques which might be used to get music performance rights.

Q You mentioned the possibility of direct license.

Do you have an opinion as to whether or not there are insurmountable barriers to CTN's adoption of this alternative?

A I think there are not insurmountable barriers except for transitional ones. I think there would be transitional problems. I think it would have to be done with some lead time. I think this is the sort of transition that always accompanies any sharp change in established business practices.

THE COURT: Miss Kearse, could we break at this time?

MISS KEARSE: Yes, this will be a good time to break.

(Recess.)

BY MISS KEARSE:

Q Professor Steiner, have you formed an opinion as to whether or not competition exists in the present market for music public performance rights?

A Yes, I have.

Q What is your opinion?

A Yes, there does exist competition.

Q And what is your opinion as to whether or not price competition exists in the present market?

A I believe there is price competition in the present

market.

Q Would you elaborate on that for us?

A I think there is price competition in the sense I described earlier of there being available alternative means of purchasing the rights to perform music. I think I identified some of those. I perhaps can say a bit more about it that the price paid by a purchaser for music rights is, of course, not only a payment directly to the copyright holder, it may involve payments to composers who are especially hired to perform, it may be a price paid in terms of negotiating costs, costs of acquiring rights, transactions It may be a cost paid in terms of speed and so on. And it seems to me there are just, whether we look at feature music or background music there are several alternatives and there are prospectively costs to the buyers of each of those and they compete with one another.

Q In your opinion does quality competition exist in the present market?

A Yes, it certainly does.

Q Would you elaborate on that for us?

A Well, there is very clearly within the context of a series of items all of which are covered by blanket license there is the choice by users among those compositions. There is further the choice between using some composition that's in a repertoire and having music specially composed, whether

it be background or feature music. There is choice with respect to such composed music as how you get to compose it. A choice among composers which has played some role. All of those seem to me to be choices of quality of music designed for particular uses.

Q Professor Steiner, were you in court today during the testimony of BMI vice president Edward Cramer?

A Yes, I was.

Q Have you become familiar with the way in which prices for music licenses with various users are arrived at?

A Well, I think I have some appreciation of that.

Q Mr. Cramer testified earlier today that the prices for BMI licenses are negotiated.

Does it make sense to you as an economist to talk about power over price in the context of negotiated prices?

A By power over price you mean power by a single party to the negotiation, no. I think all parties to a negotiation exercise a degree of power. They are discussing and arriving at a price.

Q In your opinion, does BMI have monopoly power over the negotiated price of public performance rights?

A I do not think it has monopoly power, no.

Q What factors enter into that opinion?

A Well, I think in the first place there are alternative sources of supply that it does not control that compete with it. There are other agents. There is the possibility of direct negotiation with copyright holders and so on. There is also the fact that in those negotiations it is, if we talk about it as negotiation with television network, for example, its power is counterveiled or faced with the power of the purchaser on the other side of the market.

Indeed if I may go on, if I recall what Mr. Cramer said, that they had made an offer to have disagreements subject to arbitration, impartial arbitration. It doesn't seem to me that a monopolist would make such an offer.

I don't think that that evidence would lead me to change my view with respect to their power over price.

Q Mr. Cramer also testified that CBS declined his suggestion that matters of a license for CTN ne submitted to arbitration. Does this declination by CBS have some significance in your view?

A There is disinclination? Well, it suggests to me they are not terribly afraid about facing the power of BMI in those negotiations. They assume they could hold their own in them without arbitration.

Q Professor Steiner, do you have an opinion as to whether or not the present market is operating efficiently?

A Well, that's a complicated question. I think it is operating efficiently and in many ways.

Of course, I don't have a standard of another way of operating in front of me at the moment to say if it is more efficiently. I have a good deal of evidence to suggest that it efficiently makes this large number of potential exchange of music performance rights. It seems to me to make it with fairly low transaction costs.

Q Mr. Cramer also testified earlier today that all three national television networks have blanket licenses or have taken blanket licenses from BMI since the early 1950's.

What in your view is the significance of that fact?

A That's what we would call in economics related preference. The fact that this particular market mechanism seems to have been continuously used and very widely used for the exchange suggests to me that it is a very efficient form of transaction in this market.

Q Mr. Cramer also testified that there are a few broadcasters which have taken per program licenses, including CBS Radio Network.

What in your view is the significance of these facts?

A Well, I assume this means for certain kinds of

uses that there is an alternative that appears to be more satisfactory to the parties that has survived in the market. As I recall the figure was several thousand to six for which the blanket license appeared to have been the preferred form of transaction.

Q What do you see as the role of a user's need for insurance with respect to performance rights which may be needed but are not certain to be needed with respect to the efficiency aspect of competition?

A Well, it is clear that a blanket license provides the access to or the potential access to a very large number of pieces of work and thus provides protection against infringement of that work due to unexpected or spontaneous or very short notice uses in which time it would not be possible to obtain clearance without some pre-arranged form of this kind.

Q And with respect to rights for short notice uses, how would the blanket license and direct licenses compare in terms of transaction costs?

A Well, clearly having gotten the blanket license one has rights for use with no notice whatsoever.

Q Do you think the transaction costs would be more or less with respect to those uses if a user were to attempt to get direct licenses?

A I think we have had a good deal of testimony about the fact that it would be necessary to get a specific permission to negotiate specific clearances for particular uses if you did not have a blanket license. It's been argued that first it is possible but second it is not necessarily instanteous or immediate. Both of those things lead me to think that the blanket license efficiently handles that aspect of the problem along with the spontaneous uses.

Q Now let me ask you to assume that CTN announced that effective in a year, say, it would cancel its blanket licenses from BMI and ASCAP and would acquire the bulk of its requirements for public performance rights directly from writers and publishers.

Either CTN would or CTN program producers would. And suppose that CTN announced the establishment of an office for dealing with writers and publishers.

In such a situation would you have an opinion as to how writers and publishers would respond to requests that they grant public performance licenses directly to CTN or its program producers?

A I think they would line up with the CBS or CTN window to register their willingness or their terms or the person who is available to negotiate for them.

Q And what leads you to expect this response?

A Well, in one sense all of the testimony, the great bulk of the testimony in this case but also the fact that they are in the business of selling their music and CTN is a major user, if that's the way they are going to buy music performance rights, those people I think don't want to be shut out.

Q Have you read the testimony of the CBS personnel and CBS producers that they are afraid of being boycotted by writers and publishers in this situation?

A Yes, I have.

Q And have you taken this into account in arriving at your opinion that writers and publishers would deal directly with CTN?

A Yes, I have.

Q Do you agree with their testimony?

A I don't know if I agree whether they are afraid or not. I don't believe their fears are justified. I think there is a great deal of evidence that suggests that people would deal, they want to deal, and I guess the phrase that sticks in my mind from the testimony, Mr. Brettler, I think about putting on his first and foremost hat and I think first and foremost these copyright holders want to have their music performed and they want to sell those rights and I think they would not refuse to sell them for that reason.

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Q Have you read CBS' answer to ASCAP interrogatory 47 in this action which states that performance of a composition on CTN has value beyond the performance royalty thereby earned, value in terms of exposure creation of demand for records and performances through other media?

A Yes, I have.

Q In your opinion, what role would that value of the CTN performance play in determining what the most likely response of writers would be to a CTN request for direct licensing?

A I think it reinforces my view that they would not refuse to deal.

I think that their response and other evidence in this trial suggests that it is a very valuable thing for a composer or an author to have his work played on a television network and since he makes his living by the sale of those things, I think he would continue to try and get his music played on that forum.

Q Does the fact that there are only three national television networks play a role in your opinion?

A It plays a big role, sure, that if television performance is important, the fact that you are dealing with one of only three and a large one, a large one means that to refuse to deal would shut out a very large part of the potential buyers for your market of performance of your work on television.

Q Are you familiar with the testimony of Duke Vincent that when a writer is hired by a program packager to compose music for the program he is required to deliver synchronization rights to the packager?

A I remember that testimony, yes.

Q If CTN or the program packager were to state to writers that in order to be hired to write music for a particular program the writer would have to negotiate and deliver not only those synchronization rights but also public performance rights, what would you expect to be the most likely response of writers?

A I would expect writers to negotiate. I would expect the negotiations to lead to an agreement.

Q Are you familiar with the CBS contention that a mechanism using a combination of per program licenses and direct licenses would be unworkable because the last guy in line would hold CTN up?

A Yes, I am--

MR. HRUSKA: I object to the question, your Honor, to the extent that it purports to define CBS' position on that point.

I think that it is not an accurate reflection of the CBS position.

THE COURT: I don't think any question needs to be put in terms of testimony. You can see if the witness agrees with that proposition.

MR. KEARSE: I was referring to specific testimony by Mr. Sipes.

THE COURT: I don't want to have to rule at this time whether his testimony added up to that.

Whether or not Mr. Sipes said it, do you agree with the proposition?

THE WITNESS: I remember the testimony. I thought when I read it it was foolish.

THE COURT: Excuse me. Does that mean you disagree with it?

THE WITNESS: That's correct. I stand corrected. I disagree with it.

Q Why do you disagree with it?

A Oh, for several reasons. First of all, as I think the evidence has persuaded me, people are in the business of selling music, are selling music rights for performances over and over and over again.

They are, if you like, in an industry where there are repeated use of their music. They are in the business not for one killing but for a long, long time. They know that the people who buy their music have memories and if they held them up or were regarded as having held them up, they would be likely to suffer in the future. I think there is some examples to the contrary. The happy birthday business that played so prominent a role early in the trial. My reading of that sounds as if you get a reputation of behaving that way you don't get happy birthday played very

often.

But I think equally important to that is the fact that it just wouldn't work. That is, if you--in the first place, the negotiators on the other side would be likely not to know--let you know that you were last in line or if you did, you would simply find yourself out in the cold and other people selling your music.

Q Are you familiar with the testimony of Mr. Sipes that there is a certain amount of music in the can and that CTW is afraid that it may be held up with respect to music in the can if it attempts to get licenses directly?

A I remember that testimony, yes.

Q Do you agree with that view?

A No. I think it is very much the same kind of a story. I think that people whose music is there will want to have their music used in the future and I think they will be willing to sell those rights, just as people with synchronization rights already, for music already synchronized testified that they sold them after the fact.

I think that after all, even if music is in the can, there is always the possibility of dubbing that music out and putting something else in.

So it seems to me on the grounds both of the ability to not yield to the holdup on the part of the owners

of the programs in the can that power exists and I think that there is no reason to suspect that the users of music who want to have their works purchased in the future would be so short-sighted as to attempt--as to attempt to refuse to deal on a reasonable basis.

Q And suppose there were an attempt to refuse to deal with CTN in this situation.

Is there a mechanism presently available which would place some limit on the amount of risk CTN would run?

A Well, I think that CTN can always, under the present consent decree, if I understand it, can ask for a per program license and can negotiate a price for a per program use and if that price is not reasonable, as Judge Ryan to review it but I am not clear on the legal details of it.

MR. HRUSKA: I move to strike the testimony. I think the witness was unfairly asked to render a legal opinion and I believe his testimony is inaccurate as a matter of law but whether it is accurate or not, I don't think we have to get into matters of legal issues with an economist.

THE COURT: I think first of all, as I understand it, although it is peripheral to my holding, you are a professor of law, but are you a lawyer?

THE WITNESS: I am not a lawyer, no. I am a professor of law but not a lawyer.

THE COURT: A professor of law helps.

But, putting that aside, it seems to me that he is entitled to tell us the basis of his opinion and the basis of his opinion is to why he doesn't agree with Mr. Sipes' view about the problems created by music in the can and it includes among other things his understanding that a per program license would be available, so I will allow the answer.

Q Now, Professor Steiner, are you familiar with CBS' proposed per use system?

A I think so.

Q Have you formed an opinion as to the desirability of the CBS per use system from the point of view of a user?

A By the user you mean CBS, CTN, in this case?

Q Yes.

A May I just back off for a moment and say that this system and how it works and how desirable it would be would depend very critically onwhat the level of the fee is for the quote per use feature.

I think of that as a per non-negotiated use feature of the proposal, as I understand the proposal. It complies direct negotiation for some portion of the music rights and a fee to be set for a non-negotaited use on a per use basis.

If I understand that, then my discussion of how it

would benefit or fail to benefit CIN would depend on the level of that rate.

THE COURT: Just to make the record clear, and to be sure that we are all talking about the same things, I believe that what CBS proposes is that there would be a pool of music which would be licensed by ASCAP or BMI as the case might be on a per use basis, but that for that pool of music, the per use rates would be negotiated in the first instance by the parties and, if they were unable to negotiate the rates, unable to reach agreement, then the Court would fix the rate.

Thereafter, of course, there would be no further negotiation and I think that is what you mean, isn't it?

THE WITNESS: I didn't understand it that way, your Honor, and if I am wrong --

THE COURT: Do counsel agree that I have correctly stated it?

MR. HRUSKA: Yes, your Honor.

MISS REARSE: I believe that the proposal is that the parties would attempt to negotiate but if they were not able to agree on the per use rates, then the Court would set those rates.

THE WITNESS: Excuse me. May I express my confusion?

THE COURT: Yes.

THE WITNESS: I thought that even with respect

to that pool of music that was not withdrawn, it was in this reservoir, the CTN proposal contemplated the possibility that CTN might negotiate directly with the individual copyright holder in particular cases and agree to the use of their music at a price that was lower than this --

THE COURT: I hadn't come to what else might happen. We are talking first about how the price for the pool would be reached.

THE WITNESS: Surely.

THE COURT: And that price would be reached either on a negotiated basis or, if the negotiations were unsuccessful, by the Court fixing a fee.

I think it is fair to point out that at least in my mind it is relevant that in the twenty some years of history of a similar mechanism for arriving at a price under the ASCAP consent decree, the parties have all, in the last analysis, set the price themselves although with the blessing of the Court as a formalization at various times.

Now, that is the way the price at the pool would be reached.

In addition to that, CBS proposes that it would have the right to deal directly with composers who in the instances that I think of would have withdrawn their music but there is nothing that would prevent CBS from going

to a man who hasn't withdrawn his music and asking him to withdraw his music.

MISS KEARSE: No, your Honor. I believe that the proposal is that even with respect to music in the per use reservoir, CBS would propose to negotiate directly with the owners of that music for direct licenses.

Isn't that correct?

MR. KRUSKA: I think that is exactly what the Court just stated.

THE COURT: I didn't put it properly that way but when I talked in terms of withdrawal, economically at least, it seems to me that for whatever rights are granted in that way, it is a withdrawal pro tanto.

MR. KRUSKA: In effect, for that particular use, right.

THE COURT: Go ahead.

THE WITNESS: I don't understand --

MISS KEARSE: Excuse me. Let me have my problem first. It seems to me that if the song is in the per use reservoir and a direct license is nevertheless sought, if those negotiations were unsuccessful CTN could still use the music at the per use rate.

THE COURT: That's right.

MR. KRUSKA: Perfectly clear. No question about

it.

MISS MARSH: So it is not in effect a withdrawal at all.

THE COURT: No. I apologize, but let me explain what I meant.

I meant to the extent that the composer does license directly in my mind, anyway, it is a withdrawal pro tanto, which I take it everybody knows what pro tanto means.

MISS MARSH: That is the one thing in this case, we know what it means.

THE COURT: I think we are all agreed what we are talking about then.

THE WITNESS: Perhaps -- let me -- I am not sure I understand.

May I try and restate to be sure I understand.

THE COURT: Yes.

THE WITNESS: I understand there is an initial negotiation to set a per use rate.

THE COURT: For the pool.

THE WITNESS: For the pool. I, then, as I envisage the system, envisage that there may well be subsequent use without any negotiation at all.

THE COURT: That's right. of music in the pool.

THE WITNESS: Of music in the pool. There

may be negotiations that break down and result from usage of music in the pool --

THE COURT: Between whom?

THE WITNESS: Between CTN and someone who has not withdrawn his music. There may be negotiations that may break down, there can be subsequent use of the music at the per use rate.

There may be negotiations between CTN and someone whose music is in the pool and the agreement at a rate presumably below this per use rate.

So, when I spoke of non-negotiated use, I meant only the second category, the category of cases where there was not a negotiation and agreement for rate other than the per use.

THE COURT: I understand.

THE WITNESS: What I think I was saying was the way in which the system would work out would be critically affected by how high that reservation price, that non-negotiated use price, was.

THE COURT: Can we call it the pool use price, because it is negotiated in the first instance. That is what I find difficult.

MR. KYPRIS: I hate to rise on this point, your

Honor, but your Honor will doubtless recall that we are in an area where CBS posits two alternative situations, either one price or a whole series of prices. The so-called per use may be one price or many prices.

THE COURT: I do understand that those alternatives exist, but I am only trying to distinguish between the type of negotiation between ASCAP and CTN or BMI and CTN on the one hand to set either one price or a list of prices and the negotiation between the networks and a composer directly and they are all negotiated in my mind, except that after they are negotiated in the first instance, they are fixed for a period of time and there is no further negotiation in relation to them.

They are a fall-back position as you were indicating, from the possibility of direct negotiations for those who have not withdrawn their music from the pool.

THE WITNESS: Yes. My understanding now is exactly the same as your Honor's.

Q Professor Steiner, what in your view would be the result if the fixed per use price or prices were set at a low level?

MR. KRUSKA: I object, your Honor. I think we ought to get some quantification as to what Miss Kearse means by low. That question could mean anything.

lower than what? What figures are being discussed?

THE COURT: I don't think it is necessary to refind that concept. I think that the Professor can indicate what he has in mind and you can cross-examine him on it.

THE WITNESS: It is clear I can envisage a low enough level of that per use rate, so that all copyright holders would be well-advised to withdraw their music and to prefer direct bargaining in every case. I don't know what that number is, but clearly there is such a number that is a very low rate that would have that effect, I am quite sure.

Q And if copyright proprietors, all copyright proprietors did withdraw, would the per use system in effect be an option already available to CBS?

A Yes. It would, of course, be the direct licensing option that now exists. What has been called the bypass, I take it.

Q Suppose, Professor Steiner, that a relatively high price were fixed for music in the per use reservoir. What in your view would that -- would be the result of that?

A Let me suggest that the per use rate is put at a level that would bethe level that would be agreed on if we had a per program rate. If the rate were --

THE COURT: You are assuming that --

THE WITNESS: I am assuming that for the purpose of answering the question.

May I start this answer again?

With a very high rate, I would expect virtually all negotiations to occur outside of the reservoir by direct negotiation And what I was thinking, your Honor, was that the per program rate would be the highest rate that CTN would ever be willing to pay for works left n in the reservoir since they could always require -- excuse me, always acquire the rights to music for a particular program at a per program rate.

Q Suppose, Professor Steiner, that the per use rate were fixed somewhere in the middle and that some writers and publishers withdrew their compositions from the per use reservoir.

What do you see as the effect of this on the efficiency and so forth of the functioning of the present market?

MR. KRUSKA: I object to the formof that question, your Honor. I don't believe it is comprehensible.

THE COURT: Do you understand the question, Professor?

THE WITNESS: I understand it. I have to clarify it or expand it a bit. It seems to me that what happens, again, is a function of what fraction of the works in the reservoir are withdrawn --

THE COURT: Why don't you assume various different percentages and give us your views what would be under the varying circumstances.

THE WITNESS: If virtually everything is withdrawn, to take one extreme, then we would be back essentially in the world of direct licensing with a very large volume of transactions costs involved.

If only a handful of copyrights were withdrawn,

I think there would be a substantial amount of negotiating with people whose works were left in the pool by CTN as it attempted to secure per use rates below the rate of the reservoir rate, to secure direct rates below those rates.

I think there would thus be more transactions costs incurred.

I think other cases would be intermediate. In either case I would expect there would be more negotiating. I think the only possibility in which there would not be negotiating is if so few things were withdrawn and the rate were so high -- no, I withdraw that.

I think that there would under this scheme be an increase in the amount of negotiation for direct rates that is substantially in excess of what occurs now with the blanket license.

Q What in your view would CBS gain through the institution of the per use licensing system?

A Well, I think that CBS hopes to get a per use licensing system with a per use rate that is substantially below the upper limit that I spoke about that would give to it the ability --

MR. HRUSKA: Your Honor, may I interrupt to move to strike testimony about what CBS hopes.

THE COURT: Yes, I will strike that. I don't

really think that is responsive to the question either. I don't think that is what Miss Kearse asked you. I think she asked you as an economist to give your opinion of what they would gain by the new system, not what they hope to or what you think they actually would or would not.

Is that correct?

MISS KEARSE: Yes, your Honor.

THE WITNESS: I wonder if I could have the question repeated.

THE COURT: Why don't you repeat it, Miss Kearse?

Q My question was, in your view what would CBS gain by the institution of the per use system of licensing?

A I think they might well gain the chance to use the monopsony power that they have where they are relatively strong, relative to a copyright holder, and they would have the option of using the per use reservoir price in all cases where they lacked that power. Thus, I think their cost of music acquisition rights would be less than it is under a blanket license.

I think that is what they hope to gain.

MR. HRUSKA: Your Honor, I again move to strike that last sentence, that is what they hope to gain.

THE COURT: Sustained as to the "hope."

Q You think that the cost to CBS would go down

even though the overall transactional cost would rise?

A I think that is quite possible. I think one would have to see how the system worked to be sure.

Q Have you formed an opinion as to the desirability of the CBS proposed per use system from the writer's point of view?

A Yes.

Q What is your opinion?

MR. HRUSKA: Your Honor, I object to the question, I don't think that the desirability of the system from the writer's point of view is relevant. It seems to me --

THE COURT: It all depends what is meant by the word "desirability." It is that vague. I would ask Miss Kearse to amend her question by talking about the economic benefits or disadvantages.

MISS KEARSE: I certainly accept your Honor's amendment.

A I think that the costs borne by the copyright holders, writers and publishers generally would rise.

THE COURT: What would rise?

THE WITNESS: The costs that they bear would rise and the revenues they receive would be declining. I think they would be worse off as a group under that scheme than

under the blanket scheme now in effect.

THE COURT: In other words, it would cost -- it would cost themmore to secure the sale of their music and you believe, as the obverse of what you just said about CTN buying music for less, as a groupthey would get less?

THE WITNESS: I agree with all of that. I also think they would have perhaps even greater expenses with respect to policing and monitoring to be sure their rights were not infringed than they now have.

I think they would perhaps have more problems getting an equitable division of revenues than they now have under this scheme.

MR. HRUSKA: Can I have that last answer read back, Your Honor.

THE COURT: Yes.

(Answer read.)

Q And does the fact that there is a fixed price for compositions in the per use reservoir which CTN could use if negotiations broke down play a role in your opinion?

A Well,I think, as it has been testified to and as I agreed, that that price would become a virtual ceiling price. That prices would tend to average below that price as CTN negotiated where it had the power to do so.

Q Professor Fisher expressed the view that the per

use schedule of rates to be established in t he CBS system would be inherently self-correcting.

Do you agree with this view?

A No, I do not.

Q And why not?

A Well, I think it is a ceiling price. I think that whatever that price is, the negotiations would occur and lead to the transactions at below that price. I see no tendency for that price to rise because any time there was in fact a value to CTN above that price, they would simply exercise their option to use it, use the work without the direct negotiation and pay the per use price.

Q Professor Steiner, are you familiar with CBS's proposed alternative formof relief in this action, namely that BMI and ASCAP be enjoined from granting licenses to television networks?

A Yes, I am.

Q Have you formed an opinion as to the desirability of this proposal from an economic point of view?

A Yes, I have.

Q What is your opinion?

A I think it would be ridiculous.

Q What are the reasons for your opinion?

A I think it would be eliminating from the availabl

alternative means for conducting these transactions the very mechanisms that have proven so efficient over all these years. I think there is a great deal of evidence to suggest that the blanket license is an efficient way of conveying this body of rights, this body of rights proved efficient not only in television networks, but in other forms of music use.

Q I would like to read you an excerpt from Professor Fisher's testimony, Page 1651, Line 23, questions by Mr. Hrusha, referring to depositions and the transcript in this action.

"Q As a result of that reading, have you gained some understanding of the way in which ASCAP and BMI licensed music performance rights to television networks?

"A Yes, I have.

"Q In your opinion, is that system of licensing music performance rights a competitive one?

"A No, it is not."

And continuing at Page 1653, Line 18:

"Q Are the restraints on competition in your opinion the minimum extent necessary for the market to function in the licensing of performance rights to television networks?

"A No."

Have you formed an opinion as to the soundness of Professor Fisher's conclusions?

A Yes, I have.

Q What is your opinion?

A I disagree with him.

Q Why do you agree his opinions are incorrect?

A I think in the first place Professor Fischer has neglected constraints on price under the blanket license that are there due to the availability, variety of alternative means of negotiating transactions.

I think in the second place Professor Fischer has chosen to neglect aspects of competition other than price competition. He has neglected I think the very important quality competition and importantly I think he has neglected the transactional efficiency that is involved as one of the aspects, one of the outcomes of the competitive process.

And I think finally, by myself perceiving the market, by confusing, as I see it a transaction in market with the market itself, he has failed to recognize the very extensive competition that does exist.

MISS KEARSE: I have no further questions.

MR. TOPKIS: I have no questions at the present time, your Honor.

xx CROSS EXAMINATION

BY MR. HEUSKA:

Q Is it your conviction, Dr. Steiner, that any scheme of organization that prevents the play of free market

forces is worse than an equally free system that is as efficient and progressive?

A I wonder if you would--if I could have that question read?

(Question read.)

A I agree with that statement.

Q And is there both in precedent and in your personal value judgment a strong presumption against the public utility concept if a reasonably effective alternative exists or can be found?

THE COURT: Will you repeat the question.

(Question read.)

A I would like to answer that this way if I may.

I personally have and I think our system has a strong predilection in favor of market determination as distinct from interference with that market determination, whether by public utility regulation or by other means. That is a preference for market use and market determination, that is evidently in our system rebuttable when we feel that markets do not adequately or cannot efficiently handle a particular problem.

Q Well, in general terms, Dr. Steiner, you prefer a market characterized by price competition over a market which is characterized by the absence of price competition?

A Not always. I am not sure I would prefer pay television to television that is non--where I am not buying a price. It seems to me that price competition is one among several aspects of competition and I do not always opt for price other than other aspects of it.

I don't know moreover in our society or in our values collectively any such overwhelming preference for price as distinct from other forms of competition.

Q Outside of a public utility sphere, and outside of the pay TV area, can you think of any specific commercial industries where from an economic standpoint the market is better off without price competition than it would be with price competition?

A I don't think it is very often the case that you are talking about the total absence of price competition and so on.

I think there are many cases in which we do not have every marginal aspect of every transaction priced separately where we have bundules of goods and services that are priced and where that appears to be an efficient--

Q In other words, we don't have pure competition in this country but we have imperfect price competition?

A That's not the distinction I would make. Those are technical terms that refer to specific models. What I am

saying here, we have a multi-dimensional concept in competition in which there is price, there is quality, there are ancillary services.

For example, in many cases a good is sold and it has a guarantee that comes with it.

That guarantee comes as part of the package. You do not have the option of buying that good without that guarantee and paying separately for it. It is an example of a transaction in which the maximum degree of price competition has not occurred but I don't regard that as non-price competitive.

Q Would you agree with this statement:

The unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions?

A Under some circumstances and not others. We all know that price competition can lead to externalties, to pollution, to other things that indeed are not desirable.

Q And for the business of licensing music performance rights to television networks, you would conclude that non-price aspects of competition are more important than price

aspects of competition?

A No, sir. I don't conclude that.

It seems to me that the market has determined that the blanket license which has focused on a package of things, a package of commodity, bundles being transacted at a package price, that the market has produced that and that has arisen, that is, is the market mechanism that has survived. Not that I think it is better. It seems to me that the market has demonstrated that it is a highly viable scheme, more attractive evidently than the alternative of completely direct licensing.

Q Your testimony in that regard rests on your assumption that direct licensing is a totally practicable alternative, that any television network can resort to without competitive injury.

Let us assume--let's remove that assumption.

Would you still have the same conclusion that the present use, continued use of the blanket license system demonstrates that it is the best form of system for that market?

A I'm not sure what you are asking me to assume.

Q Assume away the possibility of direct licensing as an alternative. If you assume that away, do you still conclude that blanket licensing is the best system for

licensing of performance rights to television networks?

A I assume it is the best among the available alternatives if it survives.

Q You gave testimony about one alternative which you believe is available and we will get to that

I want you at the moment to assume that alternative away. That alternative is direct licensing.

THE COURT: The question is, if there were no right to direct licensing, would that affect your view as to the desirability of the present system?

THE WITNESS: I think it is very important, I don't know if this is what Mr. Hruska is asking me or not, I think it is very important that there be the option of direct licensing. It is very important that there be an laternative to dealing with ASCAP and BMI on the part of music users and thus, I think the availability of that alternative is itself important.

Q I want you to assume for the purpose of this question that that alternative does not exist.

A That it is legally--you are talking about an exclusive license so it is legally not available?

THE COURT: Why don't we come to gripes with the issue in the case.

The case is whether direct licensing is a practi-

cable alternative or whether it is not a practicable alternative.

You have expressed a view, at least your views are based on the implied conclusion that it is a practicable alternative and Mr. Hruska is merely saying that--merely asking that if you had not felt that it was a practical alternative, would you have the same feeling about the choice of the remaining portion of the existing system?

MR. HRUSKA: Exactly.

THE COURT: To what extent, in other words, does the availability of that alternative influence your opinions?

THE WITNESS: That influenced my opinion. I believe also available, and I don't know if I am being asked to assume this away as well is that the combination of direct licensing with a per program alternative.

The per program license is available. And I believe that feature is an important and practicable alternative. If the question that I am being asked is if there was no alternative possible and it was a blanket license or nothing, then does that disturb me, the answer is yes, it would disturb me.

THE COURT: I think on that notice of disturbance we will allow you to be released for the day.

We will continue in the morning.

MR. TOPKIS: Your Honor, before we recess could we get an idea of what our timetable is going to be.

THE COURT: Let's talk in the robing room.

(Adjourned until 10 o'clock, December 12, 1973.)

CBS v. ASCAP, et al.

Transcript Corrections for the Week of December 11, 1973

PAGE	LINE	ERROR	CHANGE TO
4245	5	had	received
4245	7	registrations.	regulation.
4245	19	anitrust	antitrust
4248	3	licenses.	licensees.
4248	12	is	are
4250	13	includes	include
4250	15,21,23	licenses	licensees
4250	17	dependent	independent
4250	24	license	licensees
4250	24	is	are
4250	25	license	licensee
4251	3	license	licensee
4253	10	document,	document and
4254	8	licensing	license
4254	15	aggresion	aggression
4254	18	dence.	dence.)
4255	2	They	I
4257	2	wat:	watt
4257	20	Mr. Cramer	Mr. Cramer
4259	13	this	This
4259	16	betweenCB.	between CBS
4259	20	youmean	you mean
4260	4	counsel,whom	counsel, whom
4261	2	counsel	that Mr. Appel was present as counsel

4261	6	with Jerome	with me, Jerome
4262-4266	8	aredifferent.	are different.
4267	11	Mr.Cramer	Mr. Cramer
4268	20	becompensated	be compensated
4268	24	few	new
4268	24	agreements.	agreement.
4269	16	STanton	Stanton
4269	19	Doctor	Professor
4269	24	know.	know."
4271	9	every	ever
4271	16	record.	record --
4272	3	court	Court
4272	20	any	and the
4273	7	broadcasting	broadcasting,
4280	17	any	"Any
4280	18	concerning,A,	concerning: (a)
4280	21	any sum	any, some
4280	21	repertoire	repertory
4280	21	any sum	any, some
4280	22	program, or B,	programing, or (b)
4280	22	rates	rights
4280	25	networks shall	networks, shall
4280a	2	to and	to, and
4280a	2	on the	on, the
4280a	3	undersigned	undersigned"
4280a	3	--in	--"in

4280a	4	of, and	of": and
4280a	4	A and B	(a) and (b).
4282	6	subsidieries	subsidiaries
4284	12	Mr.Cramer	Mr. Cramer
4284	17	now.	now,
4284	25	Shuman	Schuman
4285	2	Shuman	Schuman
4285	21	performing	performance
4285	22	rights	royalty
4288	4	areonly	are only
4288	15	Mr.Cramer	Mr. Cramer
4288	22	it	there
4288	23	the terms	terms
4288	25	program not,	program -- no,
4289	2	convenient and necessary	convenience and necessity
4289	5	pup	up
4289	6	has	have
4289	14	say the	say to the
4289	19	but	but the
4290	8	Mr.Cramer	Mr. Cramer
4290	14	interest	interests
4290	12,25	useage	usage
4292	13,19, 21	useage	usage
4293	14	PX 247	PX 472
4293	16	247	472

4293	17	HOnor.	Honor.
4295	4	PX 247	PX 472
4297	18	4(a)	4A
4297	21	4(f)?	4A?
4297	23	Mr.Cramer	Mr. Cramer
4298	5	chances	changes
4298	10	askyou	ask you
4298	14	once.	ones.
4298	15	differences, they	differences, they
4300	2	471	471A
4300	13	PXExhibits	PX Exhibits
4300	13	471 and	(delete)
4301	15	direct	"direct
4301	15	public?	public"?
4302	14	privileged	privilege
4303	12	interms	in terms
4304	6	inyour	in your
4306	10,14	Mr.Cramer's	Mr. Cramer's
4309	13	arguement	argument
4309	20	together	to get
4311	8	station	substantial
4312	11	radio	radio,
4312	12	producer	produced
4315	11	In the	In
4315	23	have	has
4319	24	name price	name any price
4320	5	insome	in some

4320	11	PX101	BX101
4320	14	doyou	do you
4322	9	askyou	ask you
4322	11	Mr.Cramer	Mr. Cramer
4322	24	program,youhage	program, you have
4328	9	.hatyou	that you
4328	18	meant to	meant it to
4328	19	Mr.Cramer	Mr. Cramer
4328	23	moneys	monies
4329	10	Mr.Cramer's	Mr. Cramer's
4329	17	relevant if	relevant, if
4329	17	preculiarity by	peculiarity, by
4329	19	wroters	writers
4333	3	is	as
4333	17	benecessary	be necessary
4335	10	of	or
4336	5	motionfor	motion for
4336	6	that the	that -- the
4336	6	injunction	injunction --
4337	20	you made	you meant
4342	18	writer.	wire.
4344	9	I could I guess	could I just
4344	14	whether	that
4347	4	Kramer	Cramer
4347	8	Objection,your	Objection, your
4347	9	questions	question

4347	20	Courts.	courts.
4349	21	Mr.Cramer	Mr. Cramer
4349	25	Y our	Your
4350	15	Mr.Cramer	Mr. Cramer
4353	3	useage	usage
4353	8	conext	context
4354	20	fact in	factum
4355	17	no	no deferred
4357	16,18	worse	worst
4358	20	sheet	sheets
4360	12	produce	introduce
4364	14	Fischer	Fisher
4366	9	Fischer	Fisher
4368	14	progrfams	programs
4371	6	theCBS	the CBS
4371	14	do	did
4371	16	Mr. Kenney	Miss Kenney
4371	16	Mr.Arthur	Mr. Arthur
4371	18	167	BX167
4372	16	on	on --
4372	21	yeses	yesses
4372	22	they	there
4372	24	asterisks	asterisk
4373	17	for	of

4374	3	with	was
4377	16	no Appollo	no Apollo
4378	16	KEARSER	KEARSE
4379	16	youbeen	you been
4379	16	onthe	on the
4379	18	ismy	is my
4380	8	of	at
4380	11	Berkley	Berkeley
4380	14	you taught?	you have taught?
4380	20	had, what	had what
4382	13	y	Q
4383	5	are	is
4383	25	dealing	deal
4384	13	a	(delete)
4384	14	incompetition	in competition
4384	15	lads	leads
4385	11	transition	transaction
4385	17	about,	about?
4385	22	case,your	case, your
4386	18	wouldyou	would you
4386	24	the anticipated	the -- anticipated
4388	7	create	creates
4388	9	term change	notice uses
4388	10	changes	takes
4389	2	Brodey	Brody

4389	25	license.	licensing.
4391	15	music there	music, there
4392	3	how	who
4392	8	vice	(delete)
4392	18	A By	A If by
4393	8	counterveiled	countervailed
4393	17	ne	be
4393	20	There is	This
4394	8	exchange	exchanges
4394	15	related	revealed
4396	7	instanteous	instantaneous
4396	22	with	at
4397	5	user, if	user; if
4397	21	Brettler,	Brettler's,
4397	21	think	think,
4398	5	exposure creation	exposure, creation
4400	24	MR.	MISS
4401	18	use	uses
4401	23	is	are
4401	23,26	happy birthday	Happy Birthday
4401	25	that sound	that is that it sounds
4402	8	your	their
4403	3	users	owners
4403	14	as	ask

4403	14	;o	to
		December 12, 1973	
4404	5	is	as
4404	19	onwhat	on what
4404	22	complies	contemplates
4408	11	we	that we
4411	5	refind	refine
4412	12	bethe	be the
4412	22	n	Delete
4413	9	formof	form of
4413	18	us your	us what your
4413	18	views what would	views would
4415	2	thinkthat	think that
4415	14	hey	they
4417	4	themmore	them more
4417	6	groupthey	group they
4417	22	agreed	agree
4418	2	t he	the
4418	15	formof	form of
4419	10	23, questions	23. The questions are
4420	4	agree	believe
4420	5	Fischer	Fisher
4420	6	constraintson	constraints on
4420	7	availabilily, variety	availability of a variety

4420	9	Fischer	Fisher
4420	15	myself perceiving	misperceiving
4420	16	in market	in the market
4421	8	Andis	And is
4422	3	non	not
4422	6	other than	rather than
4422	20	bundules	bundles
4423	18	democratic,	democratic
4424	6	commodity, bundles	commodity bundles
4425	15	e	be
4425	16	laternative	alternative
4425	23	gripes	grips
4226	15	well is	well, is

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM	Before:
vs.	HON. MORRIS E. LASKER, District Judge.
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL	

New York, December 12, 1973

STENOGRAPHER'S MINUTES

Tk 1A

bb 4428

Columbia Broadcasting System

vs. 69 Civ.5740

American Society of Composers, Authors and Publishers, et al.

New York, New York.
December 12, 1973
10:00 A.M.

(Trial resumed.)

P E T E R O. S T E I N E R resumed.

CROSS-EXAMINATION (continued)

BY MR. HRUSKA:

MR. TOPKIS: Your Honor, before we begin with Professor Steiner, I am glad to be able to advise the Court that in a spirit of detente that I hope will characterize our relations not only in this trial but in many others, we have been able to agree that the charts which Mr. Nathan will testify about will come in subject to whatever withering destructive analysis our friends from CBS may make of them.

That being so, we have asked Mr. Nathan to be here ready to testify at two o'clock this afternoon, thus avoiding theproblem that Mr. Hruska had of otherwise not being able to be here until Friday afternoon.

THE COURT: I am not quite sure that I understand. You mean subject to cross-examination that they make?

MR. TOPKIS: Yes, of course.

THE COURT: And I take it that the problem of "underlying information" has been solved one way or the other.

MR. TOPKIS: They will take a good look at it and criticize it.

MR. HRUSKA: Right. I don't want to disturb the detente because I think it pretty much is as Mr. Topkis described, but I don't know that the agreement was that the charts would go in evidence. The agreement was that Mr. Nathan could testify about the charts, testify about how they were prepared prior to our doing work on that.

To the extent that testimony in cross-examination discloses the need for particular areas of backup material, then we would, after that, look at that backup material.

There is some hope, I think, that that might be unnecessary, depending upon the examination of Mr. Nathan.

THE COURT: You will wait and see if you have a problem.

MR. TOPKIS: Right. He will be here at two, in any event, ready to go.

Q Dr.Steiner, you had indicated on direct examination that you had read a good part of the testimony in this case, the transcript inthis case.

Have you read the depositions taken in the case?

A I have only read those portions of the depositions that have been read into the record.

Q Prior to asking this next question, let me define for you what we had previously referred to as a performance license from ASCAP and BMI and that is a license in which ASCAP and BMI would charge the television networks on a per performance basis so many dollars and cents for each performance, rather than on a flat fee basis or a yearly basis, yearly percentage of income, although it would not be a system in which the television networks or producers would license directly.

All the rights would come from ASCAP or BMI. The only thing that would change would be the method of billing.

Now, you had mentioned on direct examination the transactional efficiencies which you thought were brought about by the present system as a result of the immediate access which that system affords users, television networks, to the repertoires of ASCAP and BMI, this great volume of music.

Would those efficiencies be lost if ASCAP and BMI were to charge television networks on a performance basis?

A May I try and make sure I understand your question?

Q Surely.

A As I understand your question, instead of negotiating a fixed fee blanket license or a percentage of revenues blanket license --

Q Right.

A -- there would be an average per use number and then at the end of the year you would multiply the number of use by this average to get a certain total. Is that correct?

Q It is essentially correct. I would rather not use the words per use here since it confuses matters because per use is a very special thing in the case, and on the average price, it wouldn't necessarily be an average price. It would be a price negotiated between the networks and the licensing organizations for each kind of use. There might be a different price for a feature, theme and background use.

Does that clarify it for you?

A It seems to me that that involves a single

basic negotiation at the start of a period.

Q Yes, of course.

A And thus it is very similar in terms of the kind of negotiation that goes into the setting of an aggregate fee.

Q Yes.

A Whether the monitoring that would be involved under that kind of a procedure would add any transaction costs, I don't know. It doesn't seem to me that it would add a great many.

Q And you can't think of any other transactional costs that would be added as a result of the performance billing?

A None that occur to me at the moment.

Q I would like to refer to your testimony of yesterday at Page 4394.

A I have a copy here.

Q At Line 15, I believe there is a typographical error. Could you look at the last word on that line.

A Yes, sir. I agree. It should be "revealed."

Q Revealed preference, rather than related preference?

A Right.

THE COURT: What line?

MR. HRUSKA: Line 15, your Honor.

Q As a basis for a few questions, I would like to read at this point that question and answer.

The question was:

"Mr. Cramer also testified earlier today that all three national television networks have blanket licenses or have taken blanket licenses from BMI since the early 1950's.

"What in your view is the significance of that fact.

"Answer. That is what we would call in economics revealed preference. The fact that this particular mechanism seems to have been continuously used and very widely used for the exchange suggests to me that it is a very efficient form of transaction in this market."

Now, do you assume that the television networks are the best judges of their own self interests?

A I assume so, yes.

Q On that assumption, do you agree that the fact that no television network has ever attempted a bypass of ASCAP and BMI indicates that the total cost of a bypass to any of the networks that attempted it would be higher than the network is paying now for a blanket license?

A Well, almost I agree with that. I think that what I would agree to is that the expected cost apparently was

sufficiently high that they decided not to take the risk. By expected cost I mean there is some possibility that they might save money but there is some risk that they might be worse off and somehow the product of those two led them not to take, not to take those risks.

THE COURT: We are talking about expected costs, meaning the costs that the network expected it to be, not necessarily any demonstrable economic cost, right?

THE WITNESS: That's correct. And I guess, your Honor--

THE COURT: I am not saying you are right or wrong.

THE WITNESS: As I would see the costs it is not only the amounts they would pay to people in negotiating but the costs would involve the possibility that they would not get clearances they need or have infringement spontaneous uses that could cause them problems.

Costs to them can have many elements as I see it.

Q Would you agree that direct licensing on the scale required by a television network, if it is to fulfill its requirements for music performance rights, could not work without the creation of direct licensing machinery?

A It is clear that mechanisms, middlemen of some sort, would be required, yes.

Q Could you turn, Dr. Steiner, to page 4416 of your testimony yesterday.

I am sorry. I forgot to ask you and it is probably self evidence, but let me ask you, anyway.

Would you agree also that the creation of direct licensing machinery would depend, the successful creation of it, would depend upon cooperation, assistance from publishers and writers of music?

A If by assistance you mean they would have to leave their names and addresses and that sort of thing, yes, of course.

If you mean more than that, I think that--

Q It depends on what I mean?

A It depends on what you mean, yes.

Q But at minimum they would have to take some steps to signal in some referrable form to the television networks how they can be reached and who was set up in their organizations to deal for these rights?

A To the extent that information is not already available.

As I understand, for example, with respect to synchronization rights, there existed a bit of that information--

Q In the Harry Fox organization?

A That's correct.

Q Now, on 4461, you were asked the question towards the top of the page, "Have you formed an opinion as to the desirability of the CBS proposed per use system from the writer's point of view", and after some colloquy you answered:

"I think that the cost borne by the copyright holders, writers and publishers generally would rise."

"THE COURT: What would rise."

You stated, "The costs that they bear would rise and the revenues they receive would be declining. I think they would be worse off as a group under that scheme than under the blanket scheme now in effect."

Do you agree, Dr. Steiner, that that same condition would occur in the event of a bypass by a television network?

A I think that is less obvious. I think it is possible. I think the total costs of the transactions would rise if I am correct, that direct licensing is overall less efficient than blanket licensing but I think it is less clear that the change in bargaining powers are such that the writers would bear most of the costs rather than the network.

I think my own view as to why the direct licensing alternative has not been used is the expectation on the part of both networks and copyright holders that each would bear

a sufficient share of the extra costs that they are worse off under the direct licensing than they are under the blanket license.

Q All right.

On page 4402 of yesterday's transcript, you stated at line 21, "I think that after all even if music is in the can, there is always the possibility of dubbing that music out and putting something else in."

A Excuse me.

Would you give the reference once again?

Q Page 4402, line 21.

A Yes.

Q Do you see that?

A Yes.

Q Do you know what the cost would be for replacing dubbed out music with new music?

A I think someone testified it would be hundreds or dollars.

I don't know of my own direct knowledge.

Q You are referring to Mr. Dann's testimony on direct?

A That's correct.

Q Did you read Mr. Dann's testimony on cross?

A Some of it. I don't remember--I don't remember that portion and I--I confess to you in my reading, which was substantial this last week, I didn't read every word of all of the testimony.

Q All right.

You don't recall Mr. Dann limiting hundreds of dollars figure to the simple mechanical task of removing music from a sound track and putting in new music?

A I remember that.

Q Do you remember his further estimates regarding the thousands of dollars it would cost having new music created, assembling an orchestry to play it, the sound equipment, the hall, as it were, and the other costs attendant upon that process?

A Yes, I remember that.

Q You indicated on direct examination that you believe that ASCAP and BMI were in the same market.

Do you recall that?

A Yes.

Q I would like you to assume for a moment that direct licensing was in practicable for a television network.

Under that assumption would you then agree that ASCAP and BMI were in different markets?

A No.

Q Still operating under the assumption that direct licensing was impracticable--

MISS KEARSE: Could we have some elaboration on it? I'm not sure that I know what the question means. I

understood the last answer.

MR. HRUSKA: The question before was already answered.

MISS KEARSE: I'm not sure I understand what you mean by the word impracticable.

THE COURT: I think the word has taken on certain gloss or patina in this case, that it means to me that the costs are too great to make it worth using it as a realistic alternative.

The costs of one kind or another, not necessarily economic always. It just won't be done, therefore.

MR. HRUSKA: Yes.

THE COURT: I don't think that you can say that CTN has decided it is not worthwhile for it to do so.

Q Perhaps even to make it stronger, let's assume that it is just not a possibility for any reason at all, just not a possibility, cannot be done.

Under those circumstances would you agree that ASCAP and BMI are in different markets?

A No.

Q All right.

THE COURT: What was the answer?

THE WITNESS: No, I would not agree that they are in different markets.

THE COURT: All right.

Q Still operating under the assumption that direct licensing is out of the picture, could BMI bid television network business away from ASCAP by lowering the price of the BMI blanket license?

A I think that's a question really that only the networks could answer.

I have a view, but it is an outsider's view as to how that consideration might go on within the minds of the people who purchase these rights for CTN.

Q Let me ask you this:

Does the determination of whether goods or services are in the same market depend on whether they are reasonably interchangeable in the mind of the user?

A Yes.

Q If direct licensing were not a realistic possibility, would a BMI blanket license be reasonably interchangeable with an ASCAP blanket license for television network?

A May I make a somewhat extended answer to that question?

THE COURT: Certainly.

A It seems to me one possibility very clearly that a network could contemplate would be signing, let us say, a

blanket license with ASCAP and either limiting their use of music to the ASCAP repertoire or supplementing that by a program license from BMI with no blanket license from BMI, it could, I think, envisage setting up a new organization to acquire and hold copyrights, for example, of works performed by people under contract to them.

I think the networks participated in the setting up of BMI when they chose not to use ASCAP music.

And they could, I think, substitute for music that was controlled by a particular organization, in this case BMI, if that's what we are talking about, by utilizing the music of other organizations even without direct licensing of individual copyright holders.

Q Are you assuming in all this, Dr. Steiner, conserted activity on the part of all three networks?

A No, sir.

Q Collusive activity?

A No, sir. I was thinking only of a single network that might very well chose whether it needed all of the music in both repertoires or whether it needed them all and needed the particular bundels of services each of those contracts provided.

Q If a television network took a blanket license from BMI, let's say, did not take a blanket license from ASCAP,

wouldn't you have a situation in which ASCAP publisher members and writers to the extent they own their own copyrights, would be competing against a BMI blanket license and, therefore, from the perspective of the producer of a television program would be competing against music which was free at the margin?

A I don't think I understand the question.

Perhaps I should have it read back.

Q I would be happy to rephrase it or answer any questions you have about it.

THE COURT: Why don't we have the reporter read it back. Then if the professor understands it, all right.

(Question read.)

A I think I do understand the question now. If I may, I will try to answer it. I think if you are saying that the ASCAP music is of no marginal value --

Q No, no.

A -- to thse people, then, indeed, the network could get by -- may I finish my misunderstanding?

Q Okay.

A As I understand your question, indeed, if there were no value to this ASCAP music, the network could, indeed, get along well just using the BMI repertoire and the people who hold these ASCAP copyrights would be out in the cold and would have to find other uses for their music.

THE COURT: I think what Mr. Hruska meant was -- He is assuming competition, of course, between ASCAP and writers and publishers and BMI in this question.

MR. HRUSKA: I am assuming competition, inherent potential competition between musical compositions. In other words, that ASCAP music and BMI music could compete

against each other.

THE COURT: And if CBS or CTN had a BMI blanket license, the question that comes across to me is, would they ever bother with ASCAP writers and publishers if they could get free music at the margin from BMI?

MR. HRUSKA: I think that is essentially it, your Honor.

Q To make this very, very clear so there is no possibility of a misunderstanding: If CTN took a BMI blanket license and, of course, pay that flat blanket license fee, producers of television programs could use, of course, any amount of BMI music they want and the producer wouldn't perceive a cost to himself, an incremental cost for each use -- that is what I mean by BMI music under those circumstances being free at the margin to the producer.

Since CTN in this hypothetical would not have an ASCAP license and producers would be called upon to the extent they wanted to use ASCAP music to license it directly, each ASCAP musical composition would have a perceived cost to the producer. For this he would have an incremental expense.

Now, doesn't that create a situation where BMI music would be competing unfairly in a sense against ASCAP music in the mind of the producer because the producer would

have zero marginal cost for BMI music, but a positive marginal cost for ASCAP music?

A But I believe --

Q Is the answer to that yes?

A Is the answer about the marginal cost yes?

Q Yes.

A The answer to that is yes.

Q Okay.

THE COURT: I am not quite sure what the professor means by saying the answer to the marginal cost. By definition there would be no further cost to the producer to secure another BMI song if he already had paid for or CTN had the use of all of them. Your question was whether that wouldn't be competing unfairly.

MR. HRUSKA: Yes.

THE COURT: I don't know whether the professor answered that.

THE WITNESS: Not yet.

THE COURT: First of all, I don't know what the word unfairly means in this context.

Secondly, I don't know whether depending on the meaning that you have in mind, even the professor is competent to answer that question.

What do you have in mind when you say "unfairly"?

Q There is a competitive advantage on the part of the BMI music in terms of the potential use by producers over that enjoyed or not enjoyed by ASCAP music. You agree with that?

A To the extent your question is definitional, I agree with it.

Q Okay.

A I want to go on.

Q Please do.

A We now are in a situation where this producer, let it be Mr.Wright, Mr. Vincent, Mr. Sunga, can have a marginal song from BMI at no cost and can perhaps acquire the rights to something that is in the ASCAP repertoire at some cost.

Q Right.

A He, indeed, may decide that there is benefit in using this thing not in his repertoire. It is because I assume there is benefit in having songs in both repertoires that the networks have tended to have blanket licenses with each organization rather than choosing between them. If I read Mr. Sipes' testimony right, it would be quite percept for Mr. Wright to come to him and say, I need X thousand dollars to acquire that extra piece of music and Mr. Sipes would have given it to him.

In any case, what I am saying is certainly there is a marginal cost to using this extra piece of ASCAP music, there is from CBS' point of view the avoidance of the large lump sum cost.

If in their view -- CTN -- excuse me, if there is in their view a benefit equal to this cost in terms of the quality of the program, advertising revenue it can generate, I would expect them to assist the producer in acquiring it.

Q Don't you believe, sir, that the attitude of ASCAP members presented with a situation like this would harden considerably against this attempted CTN bypass by virtue of the fact that they were forced to compete against BMI music if it was free at the margin?

A No. I don't think the pressure would be on ASCAP members. I think the pressure would be on CTN. I think it would be on CTN to find some other way of acquiring the music that its producers wanted to use and I would anticipate that if they were adamantly opposed to a blanket license with ASCAP under the circumstances, they might well arrange for a per program license, so that at least in a particular program they could acquire the rights to the music. I am taking your assumption that they are not allowed, somehow, to deal directly with copyright members, that the direct dealing is ruled out, which I assume to be part of your assumption.

Q No. That was two or three questions back.

We are now in the area of whether or not ASCAP and BMI are in the same market. You said, if I understood you correctly, one of the reasons you believed there is that a television network such as CTN could in effect bypass one at a time.

I am now testing the proposition as to whether it is indeed realistic to assume that CTN could bypass one at a time, bypass ASCAP while retaining a BMI blanket license?

A No. I think that relaxing that assumption makes it even easier for me to visualize them doing this bypass. They retain one blanket license, they are in a position to negotiate in a variety of ways for use of work not contained in the repertoire of the company from which they have the blanket, from the association from which they do not have the blanket license.

They could do it presumably by directly negotiating with the publisher for his whole repertoir. They could do it by acquiring rights for a particular use of that particular piece of music in that particular context.

They could do it by dealing with ASCAP for a per program license, I understand, and I don't see any reason why they are prevented from so negotiating and might indeed do so any time that the marginal value of the music to them is sufficiently greater than zero, which would be the cost of a substitute piece of music in the BMI repertoire, is sufficiently greater than zero to warrant the cost that they would have to undertake to acquire the rights.

THE COURT: Well, that is very important, that

statement, in relation to the subject, but one further question which Mr. Hruska asked is whether you think that the fact that CTN did have a blanket license with, for example, BMI, would harden the attitudes of publisher or writer members of ASCAP in regard to negotiating directly with CTN?

A Well, I testified inmy testimony, direct testimony, I think, and I certainly repeat it now, I do not find persuasive the notion there would be a concerted refusal to do.

THE COURT: Even under these circumstances?

THE WITNESS: Even under these circumstances, because these people --

THE COURT: They would still want to sell?

THE WITNESS: Would still want to sell this very large part of their potential network exposure, every time they had a chance.

Q Forget about the concerted refusal to deal, Dr.Steiner.

Think about individual refusals to deal.

Don't you believe that in the circumstances we have just been discussing any major publishing company is going to recognize that his long range interests in these circumstances can be better served by having CBS go

back to acceptance of a blanket license and they may well be ina situation in which he, that publisher, is going to be forced to continue to compete against BMI music which is free at the margin to the consumer in this case, namely, the producer.

A Well, I think that these individual ASCAP members may regret the change in circumstances and may think indeed that, and may hope that it will prove to be a mistake to CTN and they will go back to the other arrangement but I think they will feel again as the testimony of someone said, that if they don't deal someone else will and they don't want to be left out in the cold watching all these warm bodies luxuriate in this thing.

I recall the language Mr. Brettler used, that they are likely, however reluctantly, to sell their music when they get a chance because they want to have it performed on the CTN network.

Q You said it was possible, sir, that they would regret this change.

Don't you think that it is a little more than possible? Don't you think that it is extremely probable?

A Well, I don't think I know and I don't think they know how it would work out. Clearly, if CTN didn't have a license with ASCAP and that freed it from some

millions of dollars of direct blanket license payments each year and they made that money available to their producers to purchase ASCAP music of ASCAP members, some of the members would get that money and those members probably would not be reluctant. Others who didn't get it might be, so that I don't think it is that clear, unless you want to postulate for me that the total expenditures for ASCAP music by CTN went down sharply.

It is not clear to me that in aggregate ASCAP members would lose a great deal of exposure or revenue by this change.

Q Well, you said yesterday, sir, that you thought ASCAP members as a group would lose a great deal under a per use system, that their transactional costs would be way up and the revenues would go way down.

Don't you think the same thing is going to happen in a bypass?

A No. I think they are very different situations. I think that in a bypass situation, a genuine bypass or if you like, a per use scheme with 100 per cent withdrawal, CBS would have to be negotiating for every use of this music and whether its aggregate expenditures would go up or down is not clear to me.

I think in the per use scheme as I understand

it and as it was stated in terms of the question yesterday, that is a per use scheme that involves direct negotiations with one arm of the copyright holders tied behind them.

Its negotiation for some transactions with a per pool use on all the rest and it was that feature that seemed to me surely designed to lower the expenditures by CTN for that music that it now acquires.

Q Surely their transactional costs are going up and now in the circumstances we have been discussing they also have to compete against BMI music which is free at the margin and that is a circumstance which you think is one which presents some doubt as to the attitude of the, let's say, major publishing companies?

A Well, I think it would prove very likely in terms of the transactions costs; it would be likely to prove expensive to everyone, to CTN, the copyright holders, and it might well prove to be sufficiently expensive to everybody that they would abandon that and go back to a less expensive alternative means.

Q You mentioned testimony given by Mr. Brettler about luxuriating in the warm bath of something or other.

That did not refer to direct licensing of the television network, but I will refer you to Mr. Brettler's

testimony where he said that he regarded the direct licensing of the television network a form of self-annihilation.

Now, if the major publishing companies in this country shared Mr.Brettler's view that the direct licensing of television networks was a form of self-annihilation and those publishing companies were presented with a condition in which they had to compete with BMI music that was free at the margin, under those circumstances do you believe that the attitudes of those publishers would be very hard, indeed against direct licensing CTN producers?

A I think they might genuinely regret the situation. I think they might do many things about it.

The thing I think they would not do is to refuse to deal.

I think you are quite right, that the example I took was from the 3M incident. The point is that however much Mr.Brettler worried about this, he put on his first and foremost hat and signed the deal because he wanted the income.

Q You are familiar with the doctrine of conscious parallelism, are you?

A I think I have some familiarity with it.

Q I am sure you do.

And assume that in this circumstance of CTN

having a BMI blanket license and no ASCAP license and the major publishing corporations sharing Mr.Brettler's view that direct licensing of television networks is a form of self-annihilation, assume further that when CTN canceled its ASCAP license, retaining its BMI license and all the other television networks retaining both their ASCAP and BMI licenses, that no major publisher for some appreciable period of time, let's say two weeks, dealt with a producer of a television program --

A May I ask a question? Are you suggesting that CTN cancels this license with no prior notice?

Q No. Let's say --

A I assume there will be a lead time; that they will announce a year in advance.

Q Let's say they announce it a year in advance, but on the day they cancel, there are 10producers of television programs who are going into production on the basis of scripts that have just been prepared and they need some music.

A Indeed, I would expect there would have been music put into the can during the previous year which it was known to be played after this expiration of the license and there would have been negotiation for that music before it went into the can.

Q For purposes of simplifying this question, can we remove the music in the can problem away from it.

MR. TOPKIS: It is not a problem.

A I don't think it is a problem and I think it is--

Q Whether we want to characterize it as a problem or not, let's remove that from consideration for the moment so we can get a pure question here.

A Except, Mr. Bruska, it seems to me that the scenario I would see as a reasonable scenario to fit your assumption, is one in which there will have to be on-going negotiations before the license expires, when it expires and after it expires, with respect to the acquisition for rights for music to be used on the CTN network after the network license expires.

To finish my answer--

Q Yes, of course.

A You are suggesting to me the possibility that there would be a refusal to deal that in effect become concerted whether by conscious parallelism or some other way and I am saying that I do not think that is the probably result.

THE COURT: Well, I understand that and I think it is important for me to know that but unless I ultimately agree with your forecast or if I don't, of course, and I agree with the assumptions which Mr. Bruska is going to put

into the question, I would like to know what your opinion would be as to an assumed situation, even if it is a situation which you don't think is likely to occur.

Do you follow me?

A I follow you. I am not sure if there is a question I have failed to answer.

THE COURT: Well, I don't know whether you have yet either but before Mr. Hruska was able in a sense to complete his question, you said that it was based on assumptions which you couldn't share but now let's go back to the assumptions which you can't share and see what you think would happen if that did occur.

A Surely.

Q Right.

Let's say there is no pre-announcement, that this is done cold, CBS--

THE COURT: I am not sure whether I will take that assumption.

Q Well, let's assume there is a prior announcement but--

THE COURT: I've heard about suicide throughout the cases but--

Q Let's assume there is a prior announcement but that neither CTN nor the producers of CTN programs attempt to

license music for programs yet to be written.

In other words, on day 1 CTN announces to the world, we are going to retain our BMI license and cancel our ASCAP license.

CTN and the producers make a decision that they are not going to try to license music to programs which they haven't written yet.

And let's say on Day 2 CTN cancels the ASCAP license as of two weeks later and that those two weeks are two weeks in which the programs which will appear after the effective date of cancellation are being produced.

So, on Day 2, the effort to directly license ASCAP music commences, looking forward to the cancellation date of the Day 3.

A May I assume that on Day 2 the window has been opened and they have, the mechanism has been set up to get in touch with people so that we don't have the problem of the time everyone agrees it would take to set up a network of communications for finding out what is available.

Q For the purposes of this question, please assume that, yes.

A With half a well-established mechanism by which producers independent or network, can contact copyrighters, copyright holders who are members of ASCAP.

Q Yes.

A Now, what is your question? I understand the assumptions.

Q Under those circumstances, and under the circumstances in which major publishers share Mr. Brettler's view regarding self-annilation and none of those publishers for an appreciable period of time step out to deal, would you expect that by virtue of conscious parallelism, each publisher knowing the others attitudes and seeing that the other publishers are not dealing, that the unwillingness to deal would become a hardened attitude sufficient to force CTN back to an acceptance of the ASCAP blanket license?

A May I have the question re-read.

(Question read.)

A May I ask what you mean, Mr. Hruska, when you say none of those publishers would step out to deal?

Q I think that's a good point. I think I probably should have said, consistent with the thrust of the question, none of those publishers dealt in the sense of including transactions.

Maybe they answered their telephone and maybe they talked but they didn't include a deal.

A Well, as I now understand your statement, you are saying for a two-week period, no transactions are completed.

Q Right.

A What I don't know--

Q With these publishers.

A With these publishers. But this is all the major publishers as I understand the way you phrased the question.

Q Yes.

A But I do not know and I think I need to know, whether you regard that two weeks as simply a transitional problem or whether you regard that two weeks as the beginning of a, what you expect to continue concerted refusal to deal.

Q That's really the question I put to you, sir.

A Well--

THE COURT: Can't we cut this down to size? Some manageable size.

It seems to me that the question that Mr. Hruska is asking and if he is not, that it is the only one that makes sense to me is this.

If you have a substantially important group of the publishers who at the outset of the effective change-over won't deal or won't reach agreements for so long as a two week period, do you consider that there is a substantial threat that their attitude will harden into a permanent one.

Is that it?

MR. HRUSKA: Yes, sir.

A I think that is a helpful rephrasing of the question.

I don't think two weeks would tell me anything. I believe that uncertainty with the system, negotiating time and so on and such--

THE COURT: And the sheer displeasure of having to adopt new habits, I guess.

THE WITNESS: That people would be talking to their clients, associates, and wondering what to do.

If CTN were unwilling to deal with them on a two-week period except under terms that they found unacceptable, I am not sure what the outcome would be.

I think that two weeks does not tell us how this transitional problem of a shift from one scheme to another, would shake down.

I certainly do not think that the mere failure to deal for two weeks would be a signal that it is sensible to fail to deal for two years.

THE COURT: Let me ask you this question, Mr. Steiner.

Would you expect, assuming that there was a substantial group of--we will call them recalcitrant publishers-would you expect that if CTN announced six months in advance that it was going to cancel, they would test the situation

by deliberately waiting until the end of that six month period instead of taking advantage of the six month period?

A That they, the recalcitrant group of publishers?

THE COURT: I mean you have to wait for a deadline, don't you, in any bargaining situation to find out whether the other side is going to yield or not?

THE WITNESS: Yes, sure.

THE COURT: That's why I ask the question.

THE WITNESS: And I think this is very much like lots of strike situations, showdowns, and I don't think one knows whose bluff is going to win without knowing how paralle and how conscious and how effective refusals, individual refusals to deal might be.

I simply do not have, reading this, with my limited access to information about this industry, a feeling that there is this kind of concerted view on the part of music copyright holders that would permit them to refuse to deal and to force CTN to its knees.

Q Do you believe you have enough information, Dr. Steiner, to enable you to form a judgment as to how long CTN could hold out in a bypass against refusals to deal by the major publishing corporations?

A Well, again I must ask you to answer another assumption.

Would CTN at this time have requested from ASCAP a per program license which I think would give it a degree of protection against refusal to deal? As I understand under its consent--

Q Let's assume there's been no request for a per program license.

A Well, I think that certain kinds of its use of music would be seriously inhibited if it is true that for its variety programs, its special programs, it feels its competitive ability in terms of the quality of the programs requires use of that ASCAP music.

I would think with respect to background and theme music perhaps it could still effectively hirer composers to do that and I think you could surely get from those composers independent of any publisher resistance the rights to utilize and perform the music that it acquired.

Q I don't want to go over that ground again.

Let me just ask you:

Do you have any idea how much previously published music is used as background in theme music on CTN programs?

A The only information I have was from the testimony yesterday which, as I recall that only 18 per cent of the CTN programs--only 18 per cent of the CTN programs was copyrighted music--perhaps was BMI copyrighted music---only 18 per cent was in the repertoire and presumably the rest was specially composed.

Those particular data referred to BMI and not ASCAP, and I do not remember if there is in the record a similar statistic with respect to the ASCAP repertoire.

Q So that the answer is you don't know what the total is?

A The answer, I would think probably the fractional use of BMI and ASCAP would be more likely to be nearly the same than to be wildly different.

I do not remember if there's direct data on that subject.

Q What is the basis for your assumption that they are likely to be approximately the same?

A Well, on the face of less than total information, I try to use the limited information I have since in many

other respects use of BMI, use of ASCAP music are similar. If I have no information about the ASCAP, I would think there would be some information in the utilization of BMI music, recognizing that an inference based on that might be shown to be wrong by the facts.

Q You said on direct examination, in effect, if BMI were a monopolist it would not have offered to arbitrate fees with CTN in 1969.

Can you think of any reason why BMI would have offered to arbitrate with CTN, that is consistent with the proposition that BMI is a monopolist?

MR. TOPKIS: Your Honor, doesn't that inevitably lead to all kinds of the wildest speculation?

Wouldn't the obvious answer, for example--

THE COURT: In any event, I don't think there's any point in challenging the witness to try to think of a proposition.

If you wish to put a proposition to him and see whether he agrees with it, all right.

Q Does it occur to you that BMI might recognize that one alternative to the arbitration it proposed in the license fees it proposed might well be the commencement by CBS of an anti-trust action seeking to curb BMI's power?

A I wonder if I could have the beginning of that que

tion re-read.

(Question read.)

A There is nothing I have seen in the records that that was in their mind. That it was possible it was in their mind I could not deny.

Q You thought CTN's rejections of BMI's offer to arbitrate indicated CTN's belief that BMI did not have monopoly power.

Has it occurred to you that the reason CTN might have rejected that offer was that CTN was considering instituting an anti-trust action against BMI?

A It did not occur to me, but I think it is possible. When two parties are in negotiation, there is a great variety of poses or tactics or possibilities that may run through the mind of each of them.

I don't think there's any way an outsider can divine what was the motivation. I used the example in my direct testimony simply as an indication to me that there probably was not an overwhelming inner quality of bargaining power involved in that negotiation at the least on the part of BMI as evidenced by their willingness to settle what was evident disagreement by appeal to an outside impartial authority and that I found that suggestive and I found that CTN's rejection of that proposal suggestive. I did not

meant to imply that those were the determinative.

Q All right.

If you learned that, in fact, BMI was quite concerned about the possibility of CTN bringing an anti-trust action and that CTN was very seriously considering such a move, would you then find the suggestion and rejection of the arbitration possibility not even suggestive?

THE COURT: I don't know that there's any point in asking that question.

MR. HRUSKA: I agree. I will drop it. I'm sorry, your Honor.

Q Do you agree, Dr. Steiner, that non-price competition will tend to be more vigorous the greater the limitation on price competition?

A That sounds familiar, Mr. Hruska. I think other things being equal, which is probably the caution I put in when I wrote that, that I agree that that statement--

THE COURT: Why don't you cross examine him on what Mr. Nathan said instead on what he said.

Q Are you likely to find then a situation where quality competition in a particular market is greater than it otherwise would be because the sellers in that market have agreed to fix prices?

A I wonder if I could hear that question repeated,

the last sentence.

(Question read.)

A I think that to the extent there is a lack of price competition for whatever reason, whether to do regulation, to price fixing, to other reasons, wherever that is so, the competitive instincts of rival sellers will come out and quality competition, service competition, other forms of non-price competition will tend to be more intense.

THE COURT: Would the airlines be an example of that? I mean their prices are all the same. It seems to me all they do is keep yelling how good their service is.

MR. TOPKIS: While simultaneously cutting it back.

THE WITNESS: I think it may be different forms. I used to fly one airline from Chicago to Detroit because they were rather more generous in their service of alcoholic beverages.

I mentioned that to a colleague. He said yes, but they are not as good on their maintenance.

Q Would increases in quality competition justify in your mind a limitation on price competition, say a limitation imposed by agreement among sellers not to have price competition?

A No.

MR. HRUSKA: Your Honor, I regret doing this two mornings in a row. I am very close to the end, if not the end.

If we could take the break now--

THE COURT: Fine.

MR. HRUSKA: Thank you, your Honor.

(Recess.)

MR. HRUSKA: We have no further cross examination, your Honor.

THE COURT Thank you, Mr. Hruska.

MR. TOPKIS: Could I just put a couple of questions to the witness, your Honor.

CROSS-EXAMINATION

BY MR. TOPKIS:

Q Professor Steiner, as I understand it, you testified that the networks down through history have made an economic decision to take the blanket license in preference to direct licensing because they believed that the cost in economic terms of direct licensing might be too high in comparison with the possible benefit.

Was that your analysis, sir?

A Yes.

Q And I understand you to say further that one cost that they might have had in mind might be the difficulty in getting some direct licenses, another possible cost might be the possibility of infringement through a spontaneous use, is that right?

A Those are among them, yes.

Q Would you agree with me, Doctor, that that view is based on the idea that networks act like that traditional tool of analysis, economic man?

A We live by that assumption.

Q Let me ask you this, Doctor: Isn't it possible that inertia, laziness, convenience, happiness, might also play a role in the networks continuing to go ahead with blanket licensing rather than try direct licensing.

Sure, I think that that is possible. I think that my problem with that is I have no way when people continue to do something to know whether it continues to be economically sensible or whether it is simply that they are lazy.

"Economic" means I have no way of distinguishing between those two hypotheses. Suppose I can try and rationalize them to say -- to make preference, if you like for the status quo, to make that seem reasonable. It may well be that in a satisfactory ongoing situation, if it is that, there is a satisfaction even if not a maximizing situation and an actor, in this case the network, might be reluctant to jeopardize a satisfactory situation, to rock the boat if you like, by trying something that is radically different.

So that it seems to me it may be that there is a preference for not making a change if things are going well. I am not sure I would say it definitely shows me it is due to laziness, the easy life or any of those things.

Q No, I didn't mean to suggest it did.

A I didn't mean to rule out the possibility that there is less than fully maximizing behavior where everything is recalculated down to the last dollar, to be sure it is the cheapest way, at every year, every renegotiation of a

contract.

Q A reasonable level of contentment is a perfectly acceptable reason in economic terms for continuing with an established method of behavior, isn't that right?

A I think that is true in life and in marriage, many other spheres of activity as well.

Q I agree with you totally.

MR. TOPKIS: Thank you very much.

THE COURT: Along this line, Professor, wouldn't it be a rational choice even in terms of economics if, for example, one considered -- let's assume this, I don't know that it is true -- a direct licensing might be somewhat less costly in terms of dollars spent, the inconvenience of the system was such that a perfectly rational economic corporation, economically-minded corporation might stick with a blanket license.

A Sure. I would say that speed, convenience --

THE COURT: I guess --

THE WITNESS: All of those things are aspects of the situation, although they are not easily quantifiable. Similarly, I think uncertainty itself or risk itself may play a role. Even if it were an even money chance that you would be 20 per cent better or 10 per cent worse, you might not want to take that chance because of the uncertainty.

THE COURT: Thank you.

Miss Kearse.

MISS KEARSE: I have one or two other questions, your Honor.

REDIRECT EXAMINATION

BY MISS KEARSE:

Q Professor Steiner, yesterday his Honor referred to experience under the ASCAP consent decree to the effect that although there is a judicial rate fixing proceeding available under that decree, the parties themselves have always in the last analysis reached agreement on rates for a blanket license.

With respect to the CBS per use proposal and the initial fixing of per use prices for compositions left in the per use reservoir, do you have an opinion as to whether the parties would be likely to reach agreemant themselves on those prices or whether the Court would have to set those prices?

A I have an opinion.

Q What is your opinion?

A My opinion is that they are very likely notto be able to reach agreement.

Q Why is that?

A Because I think that they are not negotiating

in that instance for the price of a well-defined thing on which there is a tendency to come together, such as a blanket license.

I think there really are two different schemes and the price that is set transforms that per use scheme into very different mechanism depending on what that price is.

As I suggested, a high price, a very high price, where it is only a form of insurance for the unintended use or for the very short term use, that is the kind of scheme that seems to me that would be attractive to the copyright holders and would make direct licensing highly feasible as a form of negotiation because it would cover the need of the network to have the protection.

I don't think that is what I understood the CBS proposal to be because I think there are repeated references to a rate that is based on what the market rate is or based on the present distributions.

They are looking for something like a rate based on the average per use rate as shown by existing or past transactions.

I think setting a rate in that neighborhood, which would clearly in my view benefit the network because it would let them, as I indicated, bargain down from that in

a significant fraction of cases, I think that that is a very much lower rate. I think thus we are not negotiating about a single rate but we are negotiating about a rate that is almost in principle of a different kind and thus it seems to me if I were negotiating or advising negotiation on one side it would not be a rate I would be willing to compromise on.

It seems to me it would be a substantial and unreconcilable breakdown in those negotiations.

MISS KEARSE: I have no further questions, your Honor.

Thank you.

RECROSS-EXAMINATION

BY MR. HRUSKA:

Q Isn't it normal to assume in economic analysis, particularly in the economics of industrial organizations, that the participants in a market are the best judges of their own self interests?

A I think it is normal to make that assumption, yes.

Q And that they are better judges of their own self interests than any outside observer, including an economics professer?

A I certainly agree, if I understand the question, that any organization should be assumed to be the best judge of its own self interest.

Q Mr. Topkis asked you a question about laziness and other factors. There was some further discussion about that.

I believe you said that that got translated into transactional cost, at least the convenient factor got translated into transactional cost, am I correct in that?

A I am not sure that is precisely what I said.

Q The idea is that the convenience afforded by the blanket license could be translated in terms of the transactional cost that would be incurred in the absence of the blanket license.

A I would like to say yes for the sake of argument to see where we are going.

Q Not too far.

Do you have any questionabout it? Isn't that a proper situation with which you could readily agree?

A My problem, sir -- I think that is a somewhat oversimplified statement

It may well not be worth going back and creating a more complex statement of the relation of a blanket

license and the things I think it does well from the point of view of different parties.

Certainly one of those things that I think it does well is to provide the several kinds of services that I think networks need to buy and it appears to do it with a very low level of transactions cost and convenience, including convenience and speed and everything else in that group.

Q Right, and, therefore, if you had a situation in which a network did not have a blanket license which provided these commodities that you referred to yesterday -- you referred to them yesterday as commodities -- then a network without the blanket license would incur certain costs because of the lack of these commodities?

A Surely.

Q And those costs could be transactional in the nature and they could also be costs stemming from any impairment to its programs?

A Of course.

Q Would you agree, Dr.Steiner, that if the producers of CTN programs cannot get the music they want to use, a sufficient quantity of it or a substantial quantity of the music they want to use, that that loss is likely to be or is likely far to outweigh any potential gain to a network in a bypass?

A I have some trouble answering that question because when you say --

Q If.

A -- if they cannot obtain -- I forget the precise phrase you used --

Q Right.

A I do not know if that is what you mean, that

they cannot obtain under any terms whatsoever or they cannot obtain at the price they want. That is, in general, I would not regard there would be an absolute barrier to obtaining anything.

Q I know you have difficulty with the assumption which is started by the word "if," but assume that there is an absolute barrier to the producers obtaining some substantial portion of the music they want so that they are below their present level of music requirements.

A And I take it you are saying that things such as hiring their own composer or having a per program license are somehow not in the picture.

Q Not in the picture?

A They are ruled out entirely.

Q Right.

A From some music that they need.

Q Right.

MISS KEARSE: I object, your Honor, to such an unreal question being posed to the witness. It is contrary to everything in the record.

THE COURT: I will sustain it not only for that reason but it also seems to me the question involves too many variables, how much music can you get, how important is the music, how it affects the quality of the program and

so forth and so on.

MR. HRUSKA: I think that is all.

THE COURT: Thank you, Dr. Steiner. It is very interesting to hear what you have to say.

(Witness excused.)

THE COURT: I think Miss Kearse is still at bat. She may have a formal statement to make.

MISS KEARSE: Yes, I have a formal statement to make. We have no further witnesses. We do have some documents and I understand that ASCAP also has some documents and depositions.

THE COURT: Would it be feasible for us to get into the document situation now?

MR. TOPKIS: We would welcome it, your Honor. The only live witness we have is Mr. Nathan whom, as I mentioned before, we can't have here until two o'clock.

THE COURT: Off the record, please.

(Recess.)

MR. TOPKIS: If we may start at the top, AX110 is a group of direct licenses which CTN has obtained on various occasions for such use as football games, the Ed Sullivan Show, a show called Lamp Unto My Feet, Captain Kangaroo and so on, and they are CTN documents and their authenticity is unchallenged.

I would offer them.

THE COURT: Are they offered for the purpose of indicating that there are occasions on which the direct licenses have been procured.

MR. TOPKIS: Yes.

MR. HRUSKA: I guess our challenge to the relevancy of the documents is that these are isolated instances. My understanding of the situation is that this occurs when the music is either not in the ASCAP or BMI repertoire because it has been written by an amateur, a band leader of a high school band, or some foreign writer who comes over with a gymnastic group, for example, on the Ed Sullivan program.

It doesn't really show anything, I don't think, and the weight is so slight here, if anything, it just seems to me to be a waste to put this in.

THE COURT: Well, gentlemen, and lady, obviously the roles are reversed here, but the arguments are precisely the same as they were a week ago on the other side, and you know that I have begun to feel that the transaction cost is getting very high and that on the whole I think it is better to let whoever is offering whatever they are offering put it in evidence with the right of the other party to

point out such things as you just pointed out to me.

Now, the very limited number of them in themselves suggests that it certainly is not going to have any substantial outcome on the effect of the outcome of the case.

MR. HRUSKA: It obviously puts us -- at least we have got now to consider whether we have to bring in a witness on rebuttal to say what I have just said. I don't think there is any real question about it, but it seems like a waste of time.

THE COURT: Don't the licenses themselves indicate pretty much the nature of the situation?

MR. TOPKIS: Yes.

MR. HRUSKA: The nature of the situation -- I don't know if it is indicated on the face of the license that a man is the band leader of XYZ high school.

MR. TOPKIS: The band leaders do usually so indicate. Most of them are colleges.

THE COURT: You mean indicate on the license?

MR. TOPKIS: Yes.

THE COURT: Do you want to show me an example?

MR. TOPKIS: Yes.

MR. SONDAK: It is not a typical example.

THE COURT: How many are there?

MR. SONDAK: 309, I think, over a period of five years.

MR. TOPKIS: One of the variety shows we have heard so much about.

MR. HRUSKA: Now we have to think about bringing in the producer of the Ed Sullivan Show to indicate the circumstances and why he obtained licenses from these people.

THE COURT: Let je see one of the Ed Sullivan ones.

I do think that with regard to the one you have just shown me, which is from African Traditional Music --

MR. TOPKIS: I just gave you the top one, your Honor.

THE COURT: It is dated December 13, 1970, or December 12, 1970, it is not very illuminating as to the background kind of information that Mr. Hruska raises and I do ask you what the position of ASCAP would be if CBS in its brief commented without having produced a witness that what its understanding of the background of this situation was. I mean , I don't want to get into a hassle about that.

MR. TOPKIS: I wouldn't object to that, of course not.

MISS KEARSE: I hate to be a fly in the ointment, but I would object. There has been an awful lot of statements of counsel that are not reflected in the record and I just don't think it is proper.

And I think that -- I don't think that the fact that the other side may be called upon to put in some evidence to explain documents that are relevant to this case can be an objection to keep them out, sufficient to keep them out.

THE COURT: There is always the question of where relevance begins or ends and the weight of the evidence begins.

I do consider this to be peripheral in the light of the limited number of such licenses indicated even if it is 300 over a ten year period, when I know what I do know, the large number of licenses that would be ordinarily required to solve the problems indicated here and so, if I were forced between a choice of allowing or requiring CBS to call witnesses or not put in the evidence, I would rule against putting it in, because I don't think it is going to be that important to the case.

However, it may cast a tiny light on something and it is for that reason that I suggested the solution which is satisfactory to other people and unless BMI can

indicate to me prejudice to it by allowing such a solution, I will admit the exhibits on the conditions indicated.

If it really hurts you, of course I will do differently but I really don't see how it does.

xxx

(Exhibit AX110 was received in evidence.)

MR. TOPKIS: Could we go to 111, then, your Honor. It is a description by CBS of its music clearance section, background purpose and functions, which was produced by CBS, and we offer it again to demonstrate only that CBS has such an operation and indeed its head, Mr. Poklitar, I believe, testified in his deposition, which is being introduced in evidence.

THE COURT: What will the document tell me that I wouldn't know from what I am sure to be a stipulation which you just stated.

MR. TOPKIS: Little.

MR. HRUSKA: That's it, your Honor. I think the Poklitar deposition covers the subject in far greater depth and detail.

I believe this document is superfluous to the extent I can read it.

THE COURT: It sounds to me that it is comulative and I prefer not to have it.

MR. TOPKIS: Next is 112, a CBS memorandum dated June 26, 1968, from a Bushing to Geer, calling attention to the fact that in 1968 payments to ASCAP were running higher and bearing upon CBS' motives in adopting the course that it did in dealing with ASCAP.

MR. HRUSKA: I think that CBS' motives for bringing this lawsuit is a subject which your Honor has already ruled on during the May portion of the trial.

I think your Honor had occasion to state that the motive for the institution of the suit was irrelevant; I believe that is the case and if that is all this document is offered for, I don't see how it is independently relevant to anything else or indeed even that.

And I think it should be excluded on the basis of your Honor's prior rulings.

THE COURT: I don't remember my prior rulings, to

be perfectly honest, but it is consistent with my gut reaction.

What do you consider to be the relevance of motives?

MR. TOPKIS: Your Honor, there's been so much talk here principally in the depositions rather than before your Honor, about how CBS was seeking to establish the rule of law and the principle that you don't pay twice and other high-minded objectives of that nature, that I would like to have in the record a reminder that they were also concerned with their bank balance.

I am sure your Honor would have that thought in mind.

THE COURT: I must say that I really don't consider the declarations of principle to be anymore relevant than the declarations of anything else.

Maybe Dr. Paley is concerned with principle. My job is to determine what the law is and so, with the assurance to you that the declarations of principle will not be controlling, I deny the offer.

MR. TOPKIS: Then, your Honor, in that case I will not offer AX 113 but go to AX 114, which are catalogues of April Music and Blackwood Music and tuna fish music, the three publishers that are owned by CBS.

MR. HPUSKA: Our objection is simply that the

information is cumulative and that the catalogues of those publishers, to the extent that the catalogues are of any significance and that is that the works are performed works already in evidence in the ASCAP Index of Performed Works, which is one of our exhibits.

THE COURT: Yes.

MR. HRUSKA: And I gather that that is already in twice.

So long as you are going to keep the documents in our own office, I am not concerned whether they are in more than once. There may be a reason to refer to them in their respective different forms.

MR. TOPKIS: Next, your Honor, we have AX 115 which is a list of domestic subsidiaries organized by CBS and that is offered, with the directors and officers, just so that we may have a program with which to deal.

So I know who Walter L. Beame, whose name and address I could never remember, is.

THE COURT: You mean to establish what the position is of various people who have been referred to.

MR. TOPKIS: Yes.

THE COURT: It seems harmless.

MR. HRUSKA: It probably is but these are positions of people in subsidiaries of CBS at least which have obviously

no relation to the case.

THE COURT: Well, I assume that they won't be referred to.

MR. TOPKIS: That's right.

116 is--

THE COURT: The last exhibit is received, AX 115.

MR. TOPKIS: 116 is the same kind of thing. It identifies CBS' various divisions and officers.

THE COURT: Is more than one necessary or does one cover something the other does not.

MR. TOPKIS: They are different.

THE COURT: Then it is received on the same basis.

xx (AX 115 and AX 116 received in evidence.)

MR. TOPKIS: AX 117, your Honor, is a list of CBS Television Network affiliates produced by CBS and, again, just in the interest of knowing who and what we are dealing with.

THE COURT: This is the list of stations?

MR. TOPKIS: Right.

THE COURT: What's a licensee of CBS?

MR. TOPKIS: Beats me, your Honor.

THE COURT: All right. That's received.

xx (AX 117 received in evidence.)

MR. TOPKIS: 118 is the same kind of document

for the CBS Radio Network.

MR. HRUSKA: That I do object to. It was pointed out to me that the last exhibit was cumulative in the sense that we had the number of the television affiliates already in evidence as part of the stipulation but the radio affiliate this case has nothing to do with it.

THE COURT: What is the relevance?

MR. TOPKIS: There have been various witnesses' testimony, and I remember for example Mr. Dann, that CBS is the largest communications empire in the world. Just in the interest of knowing what some of the details of that are we offer these.

MR. HRUSKA: It doesn't make any difference whether the CBS Radio Network has 12 million or 12 affiliates. I mean it just hasn't the slightest bearing in this lawsuit.

THE COURT: I am not sure that I agree with that, Mr. Hruska.

I mean--how can I put it.

Mr. Dann and others testified that one of the reasons they believed that composers and publishers would do business directly with CTN was because it was such a large music user.

It seems to me that if I am persuaded by that argument and even in determining whether it is persuasive,

it is relevant to know just how many outlets there are and where they are located and so on.

I wouldn't want to spend much time on it but I'll allow the exhibit.

xx (AX 118 received in evidence.)

MR. HRUSKA: I might point out, in light of the statement, CBS Radio Network is entirely a news network and it doesn't really play music other than on commercials.

MR. TOPKIS: As of this moment, that is true. There have been many times, though, in the past when the contrary was true and for all we know, tomorrow the contrary may be true.

If we may go, then, your Honor, to 119 and 120 they might be considered together because they are really just little histories of the television and radio stations which CBS itself owns and they are in effect the flagship stations of the television and radio networks.

THE COURT: Do you expect to literally quote the history at all or you just want me to know there are such stations.

MR. TOPKIS: Their histories are their own histories and the histories say that these are the most important stations in the country.

MR. HRUSKA: I don't think the history says that

at all.

I would be willing to wager anything, your Honor, that none of these statements are ever referred to in any ASCAP post trial papers.

I can't conceive the use to which they will put these.

MR. TOPKIS: We have already referred to them in pre-trial brief in point of fact.

MR. HRUSKA: I don't think that any statement contained in any of these papers--if your Honor would like to look at them--they are histories in the sense of the dates that they had licenses and what the call letters are.

THE COURT: Is this the kind of thing that Lowell Thomas looks at when he sends congratulations to a station after 25 years.

MR. HRUSKA: No doubt.

THE COURT: I will sustain the objection to this offer.

MR. TOPKIS: 121 is our agreement or 121 and 122 which can be considered together--they are the ASCAP and BMI agreements with April and Blackwood.

THE COURT: What is your position on that?

MR. HRUSKA: These really are--we have the ASCAP forms of publisher agreements in the stipulation and we have

got the catalogues of April and Blackwood.

THE COURT: Is there anything different between 121 and 122 on the one hand and the form agreements on the other?

MR. TOPKIS: Only that the date is filled in, your Honor.

THE COURT: I think that is--

MR. TOPKIS: If you want, I can add that to the record, rather than burdening the record with the form and I will be delighted to.

THE COURT: All right.

MR. TOPKIS: Our first contract with April was dated April 2, 1954, so that dispenses with--

THE COURT: What about Blackwood?

MR. TOPKIS: It seems to me that the Blackwood contract, the first one, is dated June 1, 1953.

THE COURT: All right.

And that information is accepted and the documents are rejected.

MR. TOPKIS: Then we have AX 123 to which our friends have no objection and that will be in.

MR. HRUSKA: Right.

xx (AX 123 received in evidence.)

MR. TOPKIS: 124 is a list containing the names

and addresses of the producers of the programs appearing on 123.

THE COURT: In what light will the names and addresses of producers cast on things?

MR. TOPKIS: There's been so many suggestions here that it would be very difficult to reach the producers, if you wanted to license directly.

MR. HRUSKA: There's been no such suggestion at all.

THE COURT: I didn't understand that it would be difficult to reach the producers. I understand that there was a question raised as to whether it would be easy for the producers to reach the composers.

MR. TOPKIS: All right and with the producers we now know how many producers there are and of what prominence and based on that we can perhaps form a judgment as to just how easy direct licensing could work.

THE COURT: Well, with the clear understanding that I don't believe the evidence establishes any claim or any fact about difficulty in getting in touch with producers, I will allow it to go in if it casts any light perhaps on the fact of a producer being an important person might have some kind of leverage or facilities that would make it easy for him to get in touch with composers and

publishers.

MR. TOPKIS: Exactly and most of them are conglomerates having their own publishing and record producing subsidiaries.

THE COURT: 124 is admitted.

MR. HRUSKA: I think there are really two points, your Honor.

I don't know that you can really define any significance of producers from these lists.

Secondly, this was submitted in answer to an interrogatory which asks for the names of producers and programs in prime time.

It is not a list of all producers of all programs on CTN.

THE COURT: Can I take a look at it?

MR. HRUSKA: Yes, your Honor.

(Handing)

THE COURT: If you feel that it would be in the interests of CBS to complete it by giving those that aren't listed here, that is all right.

MR. HRUSKA: I think the whole thing is irrelevant.

THE COURT: I understand that.

Like so many other things, I think it has very limited significance, but it is of perhaps some interest as to what percentage of the programs are produced by MGM, Incorporated or United Artists, Twentieth Century Fox, so on, as distinct from at least to me rather than a corporation that I don't know much about.

MR. TOPKIS: 124, your Honor is the CTN agreement with non-affiliated television stations.

Again, just to demonstrate the kind of deals that CBS makes is the purpose for which we offer it.

THE COURT: I really don't see the kind of deal that CTN makes with a non-affiliated station would prove much about what kind of a deal they would make with a composer or publisher, if that is what you have in mind.

MR. TOPKIS: These are non-affiliated stations to which they supply programs.

THE COURT: Yes.

MR. TOPKIS: When they supply programs, the blanket license covers those stations.

We want to demonstrate the considerable convenience that the blanket license offers.

THE COURT: Can't you stipulate at this moment the blanket license does cover those stations?

MR. TOPKIS: Sure, that is satisfactory. I don't know how many there are. That is satisfactory.

MR. HRUSKA: We are certainly happy to stipulate that, of course.

THE COURT: All right. The stipulation is received and the document is not.

MR. TOPKIS: 126 and 127, there is no objection

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to those.

THE COURT: Good.

They are received.

xx (126 and 127 received in evidence.)

MR. TOPKIS: Your Honor, I can take up the next bunch as a bunch because what we have here from 128 I believe to 150 is all of the licenses which we have been able to find between ASCAP and either CBS or CBS-owned and operated radio and television stations and CBS radio and television network.

THE COURT: Why do we need the documents if it can be stipulated, as I assume it can, that these licenses were issued?

MR. HRUSKA: They already have been stipulated.

THE COURT: I don't know whether it has or not.

MR. HRUSKA: There's no question about the fact that CBS-owned radio and television stations have held ASCAP blanket licenses.

THE COURT: Mr. Topkis might want to make the stipulation somewhat more detailed than that. I don't know. He might want to list the stations or the periods.

I certainly don't see any point in putting all these documents in evidence for that purpose.

MR. TOPKIS: I agree completely with your Honor.

The only additional data that we would want would be the rates that have prevailed down through the years. That really was why we wanted to put them in. It seemed a simple way to refer--

THE COURT: How much money was paid?

MR. TOPKIS: Usually they were percentages.

THE COURT: Even so, for ease of reference it would seem to me if you can simply prepare a one-page statement to that effect which could be a stipulation.

MR. HRUSKA: I would challenge, your Honor, the relevancy of the percentage rate which ASCAP charged radio stations.

Mr. Topkis has just indicated they want to make an argument that there is some significance over the fact that the rate as a percentage has dropped.

That is irrelevant. It is irrelevant in any case. It is certainly irrelevant when you don't have what the payments have been because the payments have probably gone up, even though the percentage rate might have decreased because that percentage rate was applied to a larger base.

Even so, I don't see what the significance is of percentage rates or amounts paid by radio stations, whether they are owned by CBS or anybody else, to ASCAP in this lawsuit dealing with television networks.

MR. TOPKIS: I thought that there was a Section 2 charge in this case. I don't think much of it, I will confess. I believe it is there.

It seems to me when your rate regularly goes do , whether it be a percentage or absolute dollars, that bear c the issue.

THE COURT: I think considering the breadth of economic material that both sides have offered through thei expert witnesses and in general tolerated, even on the part of the opposition witnesses, that such facts may be relevan .

I will allow the facts to go in, but I would like them to go in in some kind of simplified form instead of this whole bunch of material.

I request that you draft a proposed stipulation as to the facts which I have just said I consider to be relevant, including the rates and if CBS wants to add the payments, I think they are entitled to do so.

We don't need 30 documents in place of one.

MR. TOPKIS: That is quite satisfactory, your Honor.

I should just raise a small warning flag. It is possible that the rate base has in verbalism at least, changed down through the years.

Let us try and reach agreement on a statement.

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MR. HRUSKA: I might point out, your Honor, we have not through our economic expert or in any other area of case offered any evidence whatsoever regarding radio stations or radio network.

The only evidence that has been offered in this case, your Honor, on radio has been from the witness of defense.

Our section 2 claim does not apply to radio, only to television networks.

MR. TOPKIS: I won't buy it. Your Honor may force me to, I won't buy it.

It seems to me the idea there is such a thing as a monopolization of network television is a little bit lik monopolizing a corner drug store. You take into considera-tion the overall power of an enterprise in determining whethe it monopolizes.

We are going up against CBS.

MR. HRUSKA: It is a monopolization of licensing of performance rights to television networks that we are concerned with in our section 2 claim.

MR. TOPKIS: I appreciate that. One way we would seek to negate it is to demonstrate throughout our history of dealings with CBS in whatever form our rates have regularly gone down.

THE COURT: I think that's relevant. I will accept it.

MR. TOPKIS: And we will try to draft a document conforming to your Honor's desire.

THE COURT: That brings us to 151.

MR. TOPKIS: L51 is really--I can think of an easy way to avoid 151 and that is to recognize that we can always take judicial notice of all petitions and final orders filed in this court.

There is only one difficulty, your Honor, and that is that the files in an action called United States against ASCAP I think set records in terms of what isn't there and the disorder in which what is there is.

This document, AX 151, maybe the most convenient form in which to have it. I will promise to keep it in our office.

THE COURT: I am satisfied.

MR. HRUSKA: Well, the statement by Mr. Topkis doesn't touch upon the relevance of the offer. I would like to hear that. I don't think any of this is relevant.

MR. TOPKIS: It is relevant. CBS has regularly employed the procedures of the amended final judgment

THE COURT: It seems to me that both sides have from time to time indicated their belief that the history

of what's happened under the ASCAP decree, in particularly, the negotiations, judicial fixing arrangement and so on has some relevance to the present situation since a similar type arrangement is proposed as part of the per use system.

It may turn out not very much is to be learned from it, but I think it is relevant.

MR. HRUSKA: May I then suggest this, your Honor:

This series of materials, first of all, is a mixed bag. There are some materials in here that pertain to television network licensing, there are some materials that pertain to radio network licensing.

In the television network field there is proposed to be offered orders by Judge Ryan. Orders themselves it seems to me, your Honor, are certainly things of which judicial notice can be taken.

THE COURT: What is the difference whether I take judicial notice or whether it is an exhibit?

MR. HRUSKA: I think the difference is too slig to delay us.

THE COURT: All right.

MR. HRUSKA: Excuse me. My main concern, you Honor, about these materials, and this particularly applies the radio field, is that they are highly selective and incomplete. They concern in the radio field a proceedin which resulted in a motion by the Department of Justice to put ASCAP in contempt of Court. That aspect of the proceeding, of course, is not in these materials. I think if these materials go in, we ought to have the same understanding that we had with respect to several of the CBS offers of documents, and that is that we are to have a right to complete the picture by putting into evidence the various materials concerning the same proceedings which were put in, submitted to the Court in the same proceedings, which are left out of this collection of documents.

MR. TOPKIS: They are not left out.

THE COURT: I must say I am confused. On the one hand, I get the impression that all the orders that there were are there.

On the other hand, I get the impression they

weren't.

MR. TOPKIS: That's right.

MR. HRUSKA: I don't know whether all the odds are there, but there certainly --

MR. TOPKIS: Petitions and rat-fixing orders is what is there.

MR. HRUSKA: There are other materials in here. There are applications in here and I believe applications and motions and supporting papers. It seems to me if those go in, the other papers that were submitted to Judge Ryan in that proceeding in opposition to the papers put in by ASCAP should be part of this file and part of the record in this case.

THE COURT: I will allow the exhibits that are going in subject to your further application to me to admit such papers, but on a showing that whatever it is you want to admit does seem to be relevant. I am unable to judge from what you are saying whether I think it will or it won't. If I think something is relevant, I will certainly allow you to put it in.

MR. TOPKIS: May we then go to good news?

THE COURT: I see three things, DNO. I don't know what that means.

MR. TOPKIS: We do not offer 152, 153, 154, 155

and 156.

THE COURT: All right.

MR. TOPKIS: 157 is an affidavit of a Mr. Subbiond who is director of administrative operations for CBS Radio.

If I may consult for a moment, I will find out why it is relevant, if it is.

MR. HRUSKA: I don't think we have any objection.

MR. TOPKIS: Good. That solves that problem.

MR. HRUSKA: Let me just explain why very quickly. This particular affidavit is one of the very things that we would put in as completing the picture which I referred to just a moment before.

THE COURT: All right. 157 is received.

xxx (Exhibit 157 was received in evidence.)

THE COURT: 158 I see you don't offer. 159 and 160 are no objection, is that right?

MR. TOPKIS: Right.

MR. HRUSKA: They are already in evidence.

MR. TOPKIS: They have already been received?

THE COURT: In the event that 159 and 160 have been received in evidence, they are received now.

xxx (Exhibits 159 and 160, respectively, received in evidence.)

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MR. TOPKIS: AX161, your Honor, is CBS's annual reports to its shareholders for the last five years, six years.

(Discussion off the record.)

THE COURT: What is the purpose of these?

MR. TOPKIS: I suppose, your Honor, you are aware that CBS is a pretty significant economic institution. That is really all that these are designed to show. It has thrived despite the --

THE COURT: Predatory attacks of ASCAP?

MR. TOPKIS: Exactly.

THE COURT: I don't think I need these documents for that purpose.

MR. TOPKIS: Very well, your Honor.

THE COURT: This is a FCC report.

MR. TOPKIS: Yes, on network syndication and program practices.

MR HRUSKA: Now we come to I think the principal dispute on documentary materials in this case. We most strenously object, your Honor, to the introduction of these materials. We are dealing here with three FCC reports, great volume of material. When we discussed this last spring and when there was a pretrial conference you may

recall, your Honor, where this subject was raised and we indicated then that we would object to these materials.

There was a proposal made, I believe by your Honor, that to the extent there were portions of these materials that ASCAP wanted to rely upon, they would designate those portions and we could deal, focus on those potions. To put these whole things in -- I think we might well end up objecting to the portions they want to designate.

But now we are dealing with a great volume of interpretations of data, hearsay, multiple hearsay. This was compiled from testimony and documents much of which would be inadmissible in th it wasn't governed by the rules of evidence, o opportunity to cross-examine, there was no oppor / to review the findings. The findings made in this proceeding were not adjudications, and yet if they go into evidence in this case, they will have the effect of adjudications.

I just don't think that is fair. I don't think this stuff is admissible. At minimum , let ASCAP designate what portions so we don't have to deal with all these things.

THE COURT: What is the thickness of them?

MR. TOPKIS: The size? Right there.

MR. HRUSKA: This is it, these three things,

all single-spaced.

THE COURT: Will you give me some description of what they deal with.

MR. TOPKIS: They deal with the so-called prime time access rule.

THE COURT: What do you contend is the relevance of that and those proceedings to what is before me?

MR. TOPKIS: They show the degree to which the FCC has thought it appropriate to curb the networks' power to command hours of prime time and the degree to which the Commission has thought it inappropriate.

I think when we first discussed these, I suggested to your Honor our collective abiding faith in your familiarity with the hearsay rule. I don't offer them for any hearsay purpose, your Honor. I offer them only as documentation of the present status of the FCC attempted regulation of the networks.

MR. HRUSKA: They are not even that.

MR. TOPKIS: It is up for reconsideration, of course. It is always up for reconsideration.

MR. HRUSKA: I don't think the FCC 's state of mind or the status of this proceeding has the slightest connection with this lawsuit, and certainly to receive these things **en masse** is terribly prejudicial to us. At least

if there are specific portions designated, even if they were to go in, we would have an opportunity on rebuttal presumably to challenge their accuracy, their relevancy to this proceeding.

THE COURT: I will decline to receive them in bulk. If you wish to specify what portions you consider to be meaningful here, I will allow you to do so and allow CBS to answer and then I will rule at that time.

MR. TOPKIS: Very well, your Honor.

163, your Honor, is --

MR. HRUSKA: That is a thought, your Honor, that Mr. Sondak has just given me which I should have thought of myself. If that really is the purpose of the offer, to show the status of the proceedings, your Honor can take judicial notice of the rules that were promulgated by the FCC without our getting into all these highly debatable questionable findings.

THE COURT: Will that satisfy your purpose?

MR. TOPKIS: Certainly we expected that your Honor could take judicial notice of the rules. I bow to your Honor's ruling. If we find anything is indispensable we will call it to your Honor's attention with Mr. Hruska having the opportunity to say no.

THE COURT: All right.

MR. TOPKIS: Next we have a group, your Honor, of exhibits which we have marked at depositions which we took in this case. I think they add up to 15.

THE COURT: Do they have a number on this list?

MR. TOPKIS: Yes, they are the next number, AX163.

MR. HRUSKA: I thought 163 was withdrawn.

MR. SONDAK: I understood we would deal with these in the numbering system worked out between Bob Baker and Mark Belnick, that these 15 exhibits would be marked as AX1 through AX15, just for ease of dealing with them, rather than putting 15 exhibits in as one.

MR. TOPKIS: That is fine with us.

THE COURT: Does that mean that you have acquiesced in their admission?

MR. SONDAK: Certainly not.

MR. HRUSKA: I have not had a prior opportunity to go through these. I am sorry, I am mistaken. Now I am with it.

THE COURT: I am not quite clear. These are exhibits which were marked for identification, is that it, at the depositions?

MR. TOPKIS: Which we took.

THE COURT: But as to which there was no agreement as to whether they were admissible or they were not?

MR. TOPKIS: Right.

MR. HRUSKA: Right.

A number of the exhibits we had marked as exhibits were not received in evidence.

MR. TOPKIS: That is perhaps because of the disparity in numbers. We marked a grand total of 15, and actually several of these have already been received in evidence, your Honor. Just in the interest of having it complete, so when you pick up a deposition youwill know what was being talked about at that time, I would like to have them received.

THE COURT: Well, if they are admissible, is that a satisfactory procedure. The question is what the objection is to admissibility and I guess we will have to go through them.

Do you object to all of them?

MR. HRUSKA: No. AX1 is our affiliation agreement which is already in evidence as part of the stipulation.

If they want to put it in again as an AX number, I have no objection to that.

THE COURT: All right.

MR. HRUSKA: I don't think it is necessary, though.

THE COURT: Let's proceed.

xxx (AX1 was received in evidence.)

MR. HRUSKA: I would like to state AX2 is already in evidence also as PX201, but we would have no objection to it being received again as AX2.

THE COURT: All right. I have no objection, either. I just hope we don't get readfully confused by referring to the same thing in more than one form.

MR. HRUSKA: That is the problem.

THE COURT: I really think that if something is in evidence already -- I don't attach any significance to the question of whether it is a PX or AX or BX, so that I rule

that any exhibit on this list which is already in evidence shall be referred to by the number which it has already been accorded.

MR. TOPKIS: Fine.

MR. HRUSKA: AX1 is part of Court Exhibit 2, the ASCAP-CBS stipulation -- PX201.

MR. TOPKIS: AX3 is a letter from John Appel of CBS to Mr. Finkelstein concerning the ongoing procedures in this matter.

MR. HRUSKA: In what matter?

MR. TOPKIS: In this case.

MR. HRUSKA: No, it is not in this case. This is a letter by Mr. Appel to Mr. Finkelstein making a formal application of the ASCAP consent decree with respect to television stations. For the reasons I indicated before, I don't think the consent decree proceedings concerning television stations are relevant.

MR. TOPKIS: Its relevance is here they are suing us because we are offering a blanket license for networks and asking a blanket license for stations. That is its entire significance.

MR. HRUSKA: There is simply no inconsistence between the two positions.

THE COUPT: I don't rule there is an inconsistency

by allowing it, but I will allow it.

xxx (Exhibit AX3 was received in evidence.)

MR. TOPKIS: Next, AX4, I think that probably --

THE COURT: That is "T" letter, isn't it?

MR. HRUSKA: No.

MR. TOPKIS: That relates to TV stations, your Honor, and is a similar application for blanket licenses made within a day of the institution of this lawsuit.

THE COURT: Received with the same caveat.

xxx (Exhibit AX4 was received in evidence.)

MR. HRUSKA: Let me state for the record an objection to the receipt of that.

MR. TOPKIS: AX5, your Honor, is a similar document, an application by Mr. Appel on behalf of CBS relating to CBS O & O Television Stations for the period subsequent to December 31, 1971.

MR. HRUSKA: Same objection.

THE COURT: Received. Same ruling.

xxx (Exhibit AX5 was received in evidence.)

MR. TOPKIS: Next, I think AX6 has already been marked, the Wood letter requesting a per use.

MR. HRUSKA: In evidence as PX200.

MR. TOPKIS: AX7 is a parallel letter to BMI and that must also be in evidence.

MR. HRUSKA: As PX202.

MR. TOPKIS: Next, your Honor, we have a couple of exhibits which were marked at the deposition of Mr. Jencks who at the time his deposition was taken was a CBS official and we interrogated him at his deposition about an affidavit which he had previously sworn to when he happened to be on the other side of the fence.

THE COURT: For the purpose of illuminating his testimony, I will allow the affidavit to go into evidence.

MR. HRUSKA: Well, your Honor, I submit that there may be some prejudice in this. When Mr. Jencks prepared these materials --

THE COURT: The Shenandoah materials --

MR. HRUSKA: In the Shenandoah case. There is an affidavit and a brief in which he appears as counsel, I believe. He was not an employee of CBS. He was counsel and I think at one point president of the Alliance of Television Producers that contested the proceeding on various grounds we don't have to get into now.

His statements made at that time are obviously not being on CBS.

THE COURT: I agree.

MR. HRUSKA: And, yet, if they are admitted, I think the practical result, in terms of arguments made from

these papers both here and in the Court of Appeals will be that they will be binding on CBS.

THE COURT: I don't see that they are binding on CBS. It seems to me, however, that the Court has to know what a man previously said to be able to understand questions which I assume to have been put to him on the basis of what he previously said and I specifically rule that the affidavit itself is not binding on CBS, but that it is admissible for the sole and limited purpose of understanding his testimony.

MR. TOPKIS: And the same is true, I think, of the brief, your Honor, which he signed.

MR. SONDAK: No. There is a further problem with the brief that came out in the Jencks deposition, which was that he stated, as I recall, that he did not understand how his name came to appear on that brief in that he had nothing to do with its preparation, he was not representing them at the time. He was the president of the organization and in the deposition he explains that he had no part, no participation in preparing that brief so it can't be even admissible as to him when he wasn't working for CBS.

MR. HRUSKA: Also, your Honor, I think statements out of these papers were quoted in the deposition also,

and I think you will get the whole context of it in the deposition.

THE COURT: Based on those representations I will deny the admissibility of AX9.

MR. TOPKIS: I think he was queried but to understand the query, you are going to have to have the brief and, really, what we were doing, of course, was attacking Mr. Jencks' credibility and finding that he had signed or his name mysteriously appeared on prior inconsistent statements.

MR. HRUSKA: We offered a number of documents, your Honor, on this same ground -- that they were referred to in the deposition and the deposition was not as clear without the documents as it would be with the documents and the rulings were made excluding those documents.

I don't know why the situation ought to be different.

THE COURT: I don't intend the situation to be different and I can't challenge you because I don't recall the instances that you are talking about.

I am simply trying to use what seems to me to be common sense.

If I am reading along about what somebody said

and I can't refer to the thing that he is talking about, I can't judge the passage in question and I find myself at a loss here because I don't know which of you is correct in characterizing the extent of his connection.

If it is true that you simply asked him a question and he said I had nothing to do with that brief, then there is no point in having the brief here. On the other hand, if you asked him a lot of questions about the brief, you could have asked him questions about Webster's Dictionary too, and to that extent Webster's would be admissible just to help me understand.

So I will allow the brief in evidence, but solely for the purpose of referring to it if it is a fact that he was questioned about it.

xxx (Exhibit AX9 was received in evidence.)

MR. TOPKIS: Then we come to exhibits marked at the Poklitar deposition, the first three of which, AX 10, 11 and 12 and 13--they are all various forms used by CTN in clearing performance rights where the rights are not available through ASCAP, BMI or SESAC.

THE COURT: What will they demonstrate?

MR. TOPKIS: Just that CTN had the wit and imagination to establish forms and procedures for dealing with this problem and thereby to suggest that they might adopt similar procedures even though what more expanded ones in the direct licensing.

MR. HRUSKA: I think we have got four direct licenses here.

THE COURT: I don't think they are offered for the number of them. But is that right?

MR. TOPKIS: Yes. Just as exemplars.

THE COURT: For the sole purpose of indicating that a form can be developed, I will allow them.

(AX 10, 11, 12 and 13.)

MR. TOPKIS: 14 we withdraw, your Honor.

15 has already been marked.

MR. HRUSKA: It is the same document that we discussed before.

THE COURT: That brings us now to 164.

THE COURT: What is CBS' position on 164?

MR. HRUSKA: I am not quite sure I know what it is.

MR. TOPKIS: Your answer is to our interrogatories.

MR. HRUSKA: All of our answers to all of your interrogatories? I certainly object to that.

MR. TOPKIS: There are not that many but all right.

THE COURT: Well, is there anything in the interrogatories that is inconsistent with what's happened so far?

MR. HRUSKA: Well, I think that we answered a lot of interrogatories which we didn't think were relevant because it wasn't worth the effort fighting about the relevance. It was easy enough to answer.

ASCAP has already put in and I think BMI has, too, portions of those answers to interrogatories. I should not--

THE COURT: I decline the blanket offer, Mr. Topkis. If you want to specify which interrogatories you think should go in, I would hope on the grounds of some kind of inconsistence with something in the record and if it is not inconsistent--well, it doesn't have to be inconsistent if there is no evidence in the record other than that or if it is inconsistent I will receive it.

Assuming it is relevant.

MR. TOPKIS: Could I defer that, your Honor.

THE COURT: Yes.

MR.TOPKIS: 165 and 166 we do not offer.

167.

THE COURT: Isn't that part of the earlier?

MR. TOPKIS: Right. It should be if it is not.

168 we don't offer. 167 we will endeavor to work out a chart.

168 as I say we do not offer.

169--

THE COURT: How can that be binding on CBS?

MR. TOPKIS: I was just about to put that same question to my colleagues.

Conspiracy is obviously the ground on which it is admissible but--

THE COURT: That's in the counterclaims, is it not?

MR. TOPKIS: We will withdraw that for the moment at least.

170 and 171 we withdraw.

172 is a statement of CBS in the prime time hearings and perhaps your Honor would like us to call your attention to the portion of it that we think--

THE COURT: I think in the same fashion that we discussed the FCC proceedings themselves.

MR. TOPKIS: We will be glad to, your Honor.

MR. TOPKIS: 173 is a proposed order which became an order to ASCAP and ABC the order itself is 174, so we can surely withdraw 173 and the purpose of 174 is to show the deal that we have just recently made with ABC.

THE COURT: What's its relovance here?

MR. TOPKIS: To demonstrate that ABC is happily engaged in blanket license program.

THE COURT: The record is replete with illusions to the effect that ABC and NBC still have them.

MR. TOPKIS: It also has the particular figures which will become pertinent I think as background material for one of Mr. Nathan's charts.

THE COURT: Why not just specify what the figure is and I don't know if it will be challenged.

MR. HRUSKA: Right. The figures don't cause us any problems.

MR. TOPKIS: Okay, if the figures don't cause any problems, there is only one other way I can see that it is at all relevant and that is that it does demonstrate that we are in contractual relations with ABC through the end of 1976, I believe, and your Honor will recall at the opening we

jbe 5

suggested that they were indispensible parties.

Again, I can understand the bundle of material before Judge Ryan that you wanted to submit and I have already ruled in your favor on that and for purposes indicated but these seem peripheral to me but if there is any material from them which is relevant, I can take judicial notice of an order.

MR. TOPKIS: We will let them pass, then.

I will withdraw 175 on the understanding that we had a blanket license agreement with ABC back at that time.

Is that satisfactory?

THE COURT: Did you hear that?

MR. COLLINS: I believe that we have put this license in evidence already. This is the ASCAP-ABC blanket agreement of 1958 and we offered that as one of our--

THE COURT: I am ready to go to lunch but I would like to ask the specific significance of that particular license.

MR. TOPKIS: It is just out of order. We were putting in all of the ABC licenses.

MR. HRUSKA: I think to complete the picture, your Honor, because of the evidence about ABC and NBC's contractual relations with ASCAP and particularly because of

Mr. Topkis' statements from time to time that the other networks are just perfectly happy and contented with the blanket license system, we thought to offer some counter to that, that it would be significant to bring out that both ABC and NBC have specifically retained their right to transfer to a per use license in the event CBS got one. I think that is the significance.

THE COURT: I am aware of that and I think it is in the record, either by undisputed testimony of a witness or otherwise.

MR. TOPKIS: The only other thing we want these for is as to the rates, and the rates there have come down also.

MR. HRUSKA: We shouldn't be debating about 175 because I don't think we have any objection to 175.

THE COURT: All right.

175 is received.

xx (AX 175 received in evidence.)

THE COURT: I would suggest we go to lunch now because we have to get back by 2 o'clock.

(Luncheon recess until 2 o'clock p.m.)

ROBERT R. NATHAN resumed.

DIRECT EXAMINATION (continued)

BY MR. BLUMSTEIN:

Q Mr. Nathan, last week when you were here you gave some testimony about ASCAP's power to fix the price it will charge for its repertories.

A Yes.

Q And I take it it is no secret in this courtroom that in connection with that testimony and the views you gave, you prepared some charts?

A Yes, sir.

Q Let's take the first one.

Now, this one, Mr. Nathan, or a reduction of it --

THE COURT: Are these going to be designated?

MR. BLUMSTEIN: The reductions have been pre-marked and they have numbers.

THE COURT: Do you have reductions that I could look at?

MR. BLUMSTEIN: I think we have a set.

THE COURT: This is AX294, is that correct?

MR. BLUMSTEIN: That's correct.

Q Would you briefly explain to us what that chart

is all about?

A This chart, identified as AX294 and entitled "Indexes of ASCAP and BMI collections from the CBS, NBC and ABC Television Networks, and gross television network advertising revenues,"1962-72, is designed to show the trend in the years beginning in 1962 and ending in 1972 of two items -- one is the gross advertising revenues received by the three networks and this indicates a substantial rise subject to a slight decline in the recession years, '70 and '71, again, and then a sharp rise beyond that, but it shows the trend which is quite steep and substantial over the decade in the advertising revenues received by the three networks.

The solid line indicates the actual payments to ASCAP and BMI from the networks over the period of years -- rather the trend of those payments and we see there a much less pronounced rise indicating a very considerable lag in the relationship between the cost of music on the one hand to the networks relative to their advertising revenues or, put another way, a very substantial and significant lack of relative growth in the ASCAP and BMI income relative to the income from advertising, namely, the major source of income of the networks.

Q Let's take the top line, the broken line. Gross advertising revenues. Can you tell me where the data came from from which you made up that line?

A The gross advertising revenues are derived from figures published in the official annual reports of the Federal Communications Commission.

Q Let me show you AX296 for identification and ask you whether that was the source of your data?

A Yes. It was the source of the data for each year from 1962 through 1971.

Q What about 1972?

A Now, the 1972 figure has not yet been published. There is a rather considerable delay between the collection of the data and the time period when those data apply on the one hand and the publication on the other.

This figure for 1972, namely, bill 687.5 million was derived in a phone call with a Mr. Weinlas of the Federal Communications Commission who gave us that figure to include in this tabulation.

Q Now, would you look at AX297 and describe that document for me, please.

A AX297 reflects merely a computation. It shows as in AX296 the annual figures of gross television advertising revenues year by year and then the index is derived

merely by setting 1962 as a base and dividing each year by that base period to get the resulting index.

Q Now, let's take the bottom line, the solid line, ASCAP and BMI collections.

Where did you get the data from with respect to BMI collections?

A The data from these collections, we have both the ASCAP and the BMI figures.

Now, the BMI collections are shown and we have --

Q Let me show you AX295 and see if that is the document.

A AX295 is an answer by BMI in this particular case and it shows the BMI figures from each of the separate networks in the case of NBC for 1960 through '72 and similarly for CBS and also for ABC and the figures are then merely added together to arrive at a total.

THE COURT: Is that a BMI answer to that interrogatory?

MR. BLUMSTEIN: Yes, it is, your Honor. It is an answer to the interrogatories in BMI vs. NBC.

THE COURT: I see.

MR. HRUSKA: Your Honor, we do have an understanding, I assume, based on the statements made this morning, that the entire testimony given here with respect to

these charts and this data is subject to a motion to strike.

We don't concede the relevancy of any of these comparisons and of course we have some rather fundamental questions regarding the data, but I just don't want my silence on this to be regarded or interpreted as an assent of relevance to this material.

THE COURT: I never understand and I don't know whether Mr. Topkis and Mr. Blumstein understand that the concession you made was a concession of relevance.

MR. TOPKIS: No, your Honor.

MR. HRUSKA: And I think we have a standing objection to the relevance of all this but I understand that your Honor won't look at these materials until we have had our opportunity.

THE COURT: Right.

Let me add one thing. I don't know whether your statement was prompted by my asking about the interrogatory but whether it was or not I did that simply for the purpose of identifying in my own mind what the source was.

Q What about the data as to ASCAP collections?

A The data on ASCAP collections were derived from different sources and are separate for the three networks and this is shown in table AX 294, the third sheet of that exhibit.

THE COURT: 294?

THE WITNESS: Yes, sir. AX 294, in the third sheet. It shows the ASCAP collections from the TV networks separately for CBS and NBC and ABC.

Q Let me hand you a sheaf of documents, if I may and perhaps I will identify them for the record.

The first one is PX 419 which I understand is in evidence and it is Exhibit X to ASCAP answers to interrogatories and it shows collections from the NBC Television Network for the years 1960 through 1969.

The next one is AX 178 which is the license agreement between NBC and ASCAP relating to the period 1970 to 1976, together with Judge Ryan's order in connection with that agreement.

The next one is PX 420 which is also in evidence and again ASCAP answer to CBS interrogatories and it shows collections from the ABC Television Network for the period 1960 through 1969.

AX 174, the license agreement between ABC and ASCAP again for the period 1970 through 1976 and Judge Ryan's order in connection therewith.

AX 316, which is a letter from Richard Reimer to Mr. Rufushouse of the Nathan organization dated December 3, 1973 and annexed to it is an agreement between ASCAP and ABC relating to the period prior to January 1, 1970.

The next is AX 319, a letter from Paul Fagan of ASCAP to Mr. Rufushouse which sets forth data concerning collections from ABC for the years 1956 through 1960.

The next document is part of AX 127. It is an agreement between CBS and ASCAP for the period 1962 through

1965.

The next exhibit is part of AX 167. It is the interim fee order currently in effect as it relates to the Columbia Television Network.

THE COURT: In which case?

MR. BLUMSTEIN: Before Judge Ryan, your Honor.

And the final one is the stipulation of facts in this case and I'll refer you specifically to paragraph 10 which contains the fees paid by the network, the Columbia Network, to ASCAP for the years 1962 and 1969.

THE COURT: Does that stipulation have any exhibit number?

MR. HRUSKA: Court Exhibit 2, your Honor.

Q Now, Mr. Nathan, do those exhibits contain the raw that you used in calculating the ASCAP collections from the networks for the periods set forth on the chart?

A Yes. These do provide the raw data which we used as the basis for the development of these charts.

Q Now, let me show you AX 298 and have you explain that, please.

THE COURT: Next chart?

MR. BLUMSTEIN: No. It is another Exhibit.

A AX 298 is merely a tabulation showing the separate aggregates of the collections from the three networks

by BMI on the one hand for each year 1962 through 1972 and, then, in the next column, the related figures, namely ASCAP collections from the three networks, and then we merely summarized these two and, again, develop an index which index is based on 1962 as 100 and provides the basis for the chart shown here.

Q All right.

Mr. Nathan, you are aware that in 1969 and thereafter ASCAP received from each of the three networks some rather large sums in settlement of certain claims for the years 1969 and before?

You are aware of that?

A Yes, I am.

Q All right.

Would you tell me, and let's take it network by network, how you treated the sums received, special sums in making your calculations of ASCAP collections and let's start with CBS.

A Well, in CBS we were given the figures. There was an agreement between ASCAP and the Columbia Broadcasting System, and that is included in the material you have shown to me, and in this agreement between ASCAP and CBS there was a distribution back for each of the earlier years.

In other words, in the agreement between ASCAP and CBS there was a distribution of the special settlement between the two parties, the basis of which I don't understand. The figures were there and the two parties agreed and we merely redistributed back on top of the distributions within each year the amount that had been agreed upon to be distributed over those earlier years.

Q What about NBC?

A Well, NBC received a settlement of $3,000,000 in 1969, and this was to be apportioned back to 1961.

THE COURT: You said NBC. I think you meant ASCAP received a settlement from NBC?

THE WITNESS: That's correct, sir. I beg your pardon, sir. ASCAP received from NBC the sum of $3,000,000. There was no provision whatsoever for the distribution of that by time.

We followed what I think is a reasonable approach by adding up the original distributions year by year, '61, '62, '63, through the year 1968 and then took the ratio of each year to that total and then distributed that 3,000,000 back over the years.

So that, in essence, it was a listing of each year's figures proportionately by the size of each year.

THE COURT: In other words, if ASCAP had received $1,000,000 in 1962 and $2,000,000 in 1963, it would have allocated twice as much to the second year as to the first year.

A Exactly. It was in proportion to the original distribution, that's correct, sir.

Q Last but not least, ABC.

A Well, ABC posed a different problem. First of

all, the ABC distribution under the order was to go back to the middle of 1956, and we undertook to make this same distribution in terms of method on ABC that we undertook for NBC, namely, adding up the actual initial payments in each year using by the way the 50 per cent of the 1956 payment.

We didn't try to go back and get an initial figure for 1956 by half years. We just took half of the total for '56 and then added up every additional year through '69 and then again apportioned the settlemnt of 4 and a quarter million dollars roughly over those periods of years.

There was one little problem there that was indicated in the settlement. Some share of this four and a quarter million was non-television network and there was no basis for knowing how much of that might not have been, and the whole amount was distributed as though it were television network.

Q The agreement didn't try to break it down as between television network and anything else?

A That's correct.

THE COURT: To the extent that those revenues were included as if they were television income, that would increase the amount shown in this bottom line?

THE WITNESS: That's right, it would have increased

it. Since the original figures were on an uptrend, it would have not changed the direction of anything. It would have given a pretty much the same curve, but it would have exaggerated the level of that line.

Now, if you take out some arbitrary portion of ten per cent or 20 per cent, the level of that black line on AX 294 really would have been influenced to an insignificant degree and the relationship would not have been meaningfully changed.

Q Would you now tell me what in your judgment is the economic significance of the figures that you developed on this chart?

A Well, I think this chart has considerable significance in terms of the implications of ASCAP and BMI on the one hand, in terms of bargaining capacity and the networks on the other hand.

We have heard ASCAP and BMI characterised as cartel, or at least ASCAP.

A cartel naturally is in a position to within limits dictate the prices and dictate the terms under which it disposes of its services.

In this particular instance we see that the income of ASCAP and BMI was relatively modest. As a matter of fact, if we observed the index on page 2 of AX 294, we

see that ASCAP collections in the three years, 1970, '71 and'71 averaged just about 25 per cent higher than in 1962.

In other words, the index is up about 25 per cent.

On the other hand, in 1970 the three networks got three quarters again as much revenue from advertising as they did in 1962. There was a drop in 1971 to the--the index was a little over two-thirds, 168 per cent of what it was in 1962, but then we see in 1972 it was 190 per cent of what it was in 1962 or 90 per cent increase.

Now, based on just the chart alone it would be difficult for one to conclude otherwise than that the bargaining leverage would appear to be far greater in the hands of the networks rather than ASCAP and BMI.

Your Honor, if, on the other hand, one were to have data on music useage and one were to argue that the rise in the ASCAP, BMI collections reflected as lesser use of music, then this I think would take cognizance of the fact that useage does have a role in the negotiation on the fees that ASCAP and BMI get.

On the whole, it strikes me as certainly not a manifestation of the product of a powerful cartel condition.

THE COURT: The particular figures here would be

relevant, too, won't they? I mean, the mere pattern of growth itself doesn't establish a bargaining relationship.

If CBS' revenue was only one million dollars in 1962 and was a million nine in 1972, it would be quite a lot different?

I have to know something about the particular positions too I suppose.

THE WITNESS" That's the next chart, your Honor.

THE COURT: All right.

Q Mr. Nathan, that chart is AX299.

Do you have a copy of the reduction in front of you?

A Yes, I do.

Q All right. Would you explain that chart to us, please?

A This chart, AX299, is a measure of the percentage of the gross television from advertising of the three networks which is paid to ASCAP and BMI or, put another way, it is the ASCAP, BMI income as a percentage of the total collections of the three networks from advertising clients.

We see here that in 1962 for every dollar that was redeived, 1.45 cents was paid to ASCAP and BMI for the use of music. That is every dollar received by the networks from advertising or for every $100 received by the three networks from advertisers, a dollar and 45 cents was paid to ASCAP and BMI.

Then we see what is a rather pronounced and steady trend. It is not a solid line. It has something in the aberration in 1969 which is attributable I think, your Honor, as we saw in the previous chart -- it wasn't smooth, that adjustment of those special adjustments, '69, leaves something to be desired. It was not entirely a

transaction, it was an adjustment and not smooth.

Here we see that whereas in 1962 1.45 per cent of the networks went -- of the advertising revenues of the networks went to the BMI and ASCAP organizations, in the years 1970, 1972 and 1972 it was barely over one per cent, so that the relative proportions have dropped by a third from the decade ago to the most recent period.

This, again, I submit, your Honor, is quite the reverse of a relationship that one would expect from a powerful cartel that is able to exercise considerable monopolistic authority and capacity.

Q All right. Let's move on to the next chart.

MR. BLUMSTEIN: I think here we can take the next three, your Honor, because they have a great deal of similarities between them.

THE COURT: All right.300, 310 and 311?

MR. BLUMSTEIN: That is correct, your Honor. The one on the far left, to my left is 300, the one in the middle is 310 and the one on the side is 311.

Q Mr. Nathan, would you explain those charts to us, please?

A These charts were designed to look at the rewards or benefits or income received by ASCAP members over

a period of time and, here again, we were analyzing data which might shed some light on bargaining capacity and bargaining capability, and here we sought to compare the trends in income of ASCAP members with other general measures of income in our economy.

In each of those three charts the three lines other than the ASCAP members' incomes are similar. In each chart there is a dotted line which indicates the monetary, namely, the dollar, current dollar average income per capita of all people in the United States, men, women and children.

We also included in this chart a solid line which shows for the ten years starting in 1962 -- actually it is 11 years, including the beginning and the end -- the average weekly earnings of all production workers in non-agricultural industries, and that takes all of the economy except agriculture, and it includes production workers. This is not supervisory. We don't include the officers and the management. This is the workers in all industries other than agriculture, and we see there the rise in average earnings.

Then the third line, which is common in all three of these charts, which is the line with dashes -- indicates what happened in the average weekly earnings of production workers or non-supervisory workers inmotion

picture filming and distribution.

We do not submit these as necessarily typical at all. We could have used the steelworkers or the automobile industry or retailestablishments, but we thought these were sufficiently indicative of what has been happening generally in terms of incomes in the economy.

Then we show in each of the charts a trend line of the average income to ASCAP writers. Here we used three separate measures, one on each chart.

The chart identified as AX300 is the trend of the average revenues or average income in each year of all ASCAP members who received any incomes. That is shown on the first chart. I don't think any elaboration is needed for me in explaining the gaps or the differential trends that are revealed there.

We obviously have a very modest rise in the early part of the -- in the middle of the sixties in the ASCAP average distribution to all writer members receiving some income, but we also see that in the late years, namely, '70, '71 and '72, the average was even less than in 1962.

THE COURT: This is in actual dollars, right?

THE WITNESS: It is an index of actual dollars, Yes, sir.

THE COURT: I mean that what it means, for

example, is that the average ASCAP distribution, which means I suppose the average ASCAP member who received a distribution in 1972, received less than he received let us say in 1970.

THE WITNESS: That is correct, sir, less current dollars than in '70.

A (continuing) If we take the second chart, AX310, and there we have confined our analysis only to the ASCAP members who received 5000 or more in each year.

THE COURT: The other three lines are constant on all three charts?

THE WITNESS: Exactly, sir. They are the same.

A Here we see again a trend line which for the early part there, until about 1966 or '67, seem to be able to maintain a pace with the other measurements of income, but starting in 19 -- in about 1967, a serious lag took place. Interestingly enough, while the other categories were able to bargain effectively in getting their income up as the economy expanded and more seriously as inflation occurred, the ASCAP members earning five thousand or more as writers leveled off and actually declined and were lower in the last three years than they were back in 1968.

THE COURT: This has a lot of familiarity to me with the situation of the Federal Judges. Especially in the last five years.

THE WITNESS: Well, I suspect, your Honor, the bargaining power may be the same; I don't know. But the third chart is identified as AX311, and there again the three lines on per capita personal income and the weekly earnings of non-supervisory workers in all non-agricultural industries and in the motion picture filming and distribution industry are the same, but here now we confine our analysis of ASCAP member income to those who received $10,000 or more and here again we see a seeming ability to maintain a level or growth up to '66, '67, '68, but really starting in '66 it stopped rising and except for a slight increase in 1969, it has been a level period at a time when other have been rising very, very materially and I think when one knows what the inflation problem is, one can see what has happened in terms of the real income to these ASCAP members who are receiving this kind of income.

An d then I think that these charts are just about the opposite of what one would expect in relationships of the recipients of income in an industry which was a cartel or had tremendous bargaining power as compared with the

incomes in other industries and I think that this shows, in my judgment quite the opposite, namely, that over a period of years, the ASCAP members have fallen very, very seriously behind in terms of their command over income.

Q Let me hand you AX301 through AX308 and AX320 and 321 and with those documents in front of you, would you please explain to us the data that you used to get the three constant lines on each of the three charts.

A Yes. Briefly, let metake one line at a time. The per capita personal income of the total economy is merely an index of an arithmetic result of dividing total personal income by total population in each year.

THE COURT: That is from the BLS?

THE WITNESS: Well, the population is derived from the census, sir, and that is shown in AX301. It is not a census publication. We just took it where it was most convenient. This was taken from the economic report of the president that is issued each year and this shows in Column 1 the total population of the United States ann ally.

Then we have the next exhibit, which is AX302 -- by the way, the personal income is not measured by the Department of Labor, that is measured by the Department of Commerce. The Department of Commerce has what they call the national income division.

I used to be in charge of that myself many, many years ago and they developed these estimates and we did it back in the thirties, already.

But here we have a measurement of personal income on AX302 and the figure there is preliminary for 1972 and we took from the survey of current business the 1972 figure, finally, which is a mild revision.

Now, it is merely a matter of, again, as I say, dividing the total personal income by the total population to get the per capita and then we put that on an index basis.

Now, if I may take this, it is the average weekly earnings in the motion picture filming and that is in AX305. This is taken from the Department of Labor, Bureau of Labor STatistics and they publish hourly earnings and hours worked per week and weekly earnings and in the upper right-hand corner of the page, dealing with services, in AX305, we have from the Department of Labor the annual series for average weekly earnings in the motion picture filming and distribution industry and we have that figure through 1970 and the 1971 figure came from -- I guess this is Exhibit 320and that is also from the Bureau of Labor STatistics.

And 321, one is for 1971 and the other is for 1972.

THE COURT: Did you pick the motion picture industry because of its being an element of the entertainment field?

A Of the entertainment field. There are a great many selections to be made. I honestly believe, your Honor, that we could have picked any significant number of service industries and the basic pattern wouldn't have been different. We all know that inflation in the last several years has been very very substantial and that wages, monetary wages, have risen, some more than others, but by and large the trend is not too distinct from what we see here.

THE COURT: I understand.

A Anyhow, the motion picture figures come from the Bureau of Labor Statistics material.

Now, AX306 actually shows the dollars of weekly earnings in the motion picture filming and distribution, non-supervisory workers that went up from $123.30 a week in 1962 to $302.96 in 1972.

Also on AX306 we show the figures for the total non-agricultural industries and those data come also from the Bureau of Labor Statistics and we have again AX307 which shows the figures through '72 but the '72 figures are preliminary, and so we have given here the survey of current business for June 1973, which shows the revised

figure and that is Exhibit AX308.

So, here are the sources of these three series.

Q What about the non-constant line, the average ASCAP distribution to writers?

A The data from the ASCAP distribution to writers came to us from ASCAP.

Q I will show you AX309 which is a letter to Mr. Hughes, again, from Mr. Fagan, dated December 3, 1973, and there are various enclosures and attachments.

A That provided the data for the three figures showing the average ASCAP distribution to the writers of those who received any income whatsoever --of those who received 5000 or more a year and those who received 10,000 or more a year.

We derived this from this ASCAP information.

THE COURT: They sent you the information as to who earned what and you --

THE WITNESS: No, sir. We asked them for what we wanted. We asked for distribution of income by levels and they used their runs and sometimes manual ways and they established a sequence of income recipients by levels of income and then they summarized and, for instance,in this Exhibit 309, sir, you can just refer to Item 1. You can see there a set of tables that shows for 34 income classes --

MR. BLUMSTEIN: I don't think your Honor has that exhibit.

THE WITNESS: Sorry, sir. It shows, just as an example for any given year, it shows for 34 income classes, starting at the smallest with one dollar, and then $20 and then 20 to 100 and then it runs up to 100,000 and over, and for each of the classes it shows how many writers were in eachcategory and the totaled income of each writer in each category.

MR. HRUSKA: I would like to interject and say this is almost certainly a part of the backup data which we would be very interested in having.

THE COURT: I understand.

MR. BLUMSTEIN: I expected that.

Q Let's move on to the next chart.

This is 315. Mr. Nathan, do you want to explain 315?

A Yes. This exhibit identified as AX 315 is entitled "Relationship of the Index of Average ASCAP Distribution to Writer Members Receiving $5,000 or More to the Index of Per Capita Personal Income in the Total Economy for 1962-'72."

This is simply taking the figures from Exhibit AX 310 and dividing the index of per capita personal income by the index of the ASCAP recipients earnings to show the relationship and what this merely shows is that in 1962, and I am not saying that is--you know, that is a perfect normal base by any means, but just looking at the sweep received, whereas one takes a one to one relationship in 1962 between the average income of ASCAP workers or members, beg your pardon, getting 5,000 or more, by 1972 the ASCAP members were getting roughly two-thirds relatively.

This is an index relationship, that in 1972 the index is down to 64.7 per cent.

THE COURT: In other words, if the average ASCAP member who received $5,000 or more in 1962 received the same amount as the average, the per capita--

A It would have been a hundred.

THE COURT: Yes, on that assumption he received two-thirds or his relationship was such that his distribution from ASCAP was two-thirds of that per capita income in 1972.

THE WITNESS: That's correct.

In other words, if the two had risen in the same relationship, it would still be 100 and this could happen if the per capita income stayed the same. This means that the ASCAP distribution went down 35 per cent or if the ASCAP figure had stayed the same as in '62, this means that the per capita personal income rose roughly 50 per cent.

THE COURT: And this gives them on one line a concept which was on two lines on the other chart?

THE WITNESS: That's right, and it shows the declining relationship and again, your Honor, the conclusion I must draw from this figure, taking not every factor into account is clearly this kind of a lag or relative deterioration in relationship to the per capita of the entire society, not the working members but the entire society, was one in which ASCAP members fell rather

significantly behind.

Q Mr. Nathan this is the last chart and it is PX 12.

Would you explain that?

A Yes, this AX 312 is entitled Indexes of Consumer Prices and ASCAP Collections from CBS, NBC and ABC Television Networks in 1962-1972.

This chart has the rather simple conclusion to be drawn from it, the purpose of showing this chart is to get some idea of what's happened to the real buying power of these aggregate collections of ASCAP from the three networks.

This is not per capita. This is total aggregate collections received from the television networks over the last decade and what we see again is that the, obviously the real income, the buying power, the adjusted for price change income of ASCAP rose up to 1967 because we see a greater rise in ASCAP collections than the consummer price index and therefore that means that the buying power of these collections increased.

And then we find a leveling off in 1968 and except for that rise in 1969, which again I say leaves something to be desired in a meaningful year to year change, we find a rather serious lag occurring and in recent years, the last three years, namely, 70, '71 and 1972, the ASCAP

collections buy less in real goods and services than they bought in 1962, if you deflate by the consumer price index.

In other words, the total income of ASCAP from the three networks is lower than the consumer price index in relation to 1962 and that means that the ASCAP money derived from NBC, ABC and CBS Television Networks in the last three years of '70, '71 and '72 are lower in real buying power than they were ten years ago.

Q Now, Mr. Nathan, the dotted line on AX 312, ASCAP collections, that data was obtained in the same way as the data was obtained for AX 294, is that correct?

A Exactly the same figures.

Q The same line?

A Yes.

Q What about the line, the solid line, consumer prices, and let me show you AX 313 and AX 314.

A Yes. The consumer price index comes from the, actually it is derived by the Department of Labor. They collect the data but again for convenience we copied a page from the Report of the President to the Congress for 1973 and that shows all items of consumer price index for each of the years and that is the basis for this index.

And the Exhibit AX 314 is nothing more than taking that index from the Bureau of Labor Statistics which has a

1967 base -- that's the common base that the Government uses in its measurements; at least it has been for two or three years now--and so we wanted to convert them to a base year for comparative purpose and that is what AX 314 is.

MR. BLUMSTEIN: Your Honor, I have no further questions of Mr. Nathan and I would like at this point to make a formal offer of the charts and the back up material to which he has testified.

THE COURT: I will reserve decision on that offer in accordance with our prior discussions.

Mr. Hruska, do you want to take a little time to confer or are you ready to go ahead?

MR. BAKER: Your Honor, if we could take ten minutes I think it would go a good deal faster. I have a lot of papers to rearrange.

(Recess.)

xx CROSS EXAMINATION

BY MR. BAKER:

Q Mr. Nathan, looking at AX 294, did I understand your testimony to be that the line which is labeled ASCAP and BMI collections represent the amounts paid by each of the television networks for music useage during the year indicated?

A That's correct.

Q Directing your attention to AX 295, do you have a copy of that before you?

A Yes, I do.

THE COURT: 295?

MR. BAKER: Yes.

THE COURT: Is that the chart?

MR. BAKER: That's the BMI answer to interrogatories setting forth BMI payments to the networks.

Q Do you know the date on which that document was prepared?

A It must have been relatively recent. I don't know. It says it is in answer to interrogatory dated February 26, 1973.

Q It was prepared during the course of litigation, I believe it was NBC and BMI?

A That's what I understand, yes. It is indicated in the title area.

Q. Do you know what that litigation was about?

A I do not.

Q If I told you that the litigation concerned BMI's claim that NBC had underpaid it for prior years and that subsequently there was a settlement of that claim and a lump sum figure paid over a number of years to be paid in the future, would that affect your conclusion as to whether that line represented amounts paid by NBC, say, to BMI?

A Of course. Sure, it would, it should be added in. If there were settlements and distributed back over a number of years, it should be added.

Q No, sir. I think what I said, it was a settlement but instead of distributing it or allocating it to back years, it was a claim with respect to back years, it was paid in installments of future years.

A Yes, I think it should be included.

Q The same would be true with respect to ABC if that were the case?

A If there were a settlement in relation to past payments, it should be included.

Q Are you aware that there is now outstanding a claim against CBS by BMI for payments due over back years?

A I am not.

Q If that were the case, would the same hold true, that the figures there or the indeses there don't accurately represent amounts received by BMI?

A To the extent that is true, whatever the magnitude it should be added in and the figures would be changed by whatever amounts were involved.

THE COURT: I am not quite clear about this, Forget the second example. You are assuming, and perhaps correctly, I suppose it is correct, that BMI's claim against NBC was a claim for past services but the settlement was to be pro rated over future payments.

MR. BAKER: That's correct, your Honor.

THE COURT: Miss Kearse.

MISS KEARSE: Let me rise to correct that. The actions in which this interrogatory answer was filed, AX 295, was not an action involving a claim for past. That was an action in which NBC was seeking a new license with respect to the period subsequent to April 4, 1970.

When that action was settled, there was settlement of a claim against NBC in another action with respect to the past. The settlement was for a lump sum to be paid out over a period of years. No allocation was made with respect to BMI's claim against NBC for past payments.

THE COURT: Did you hear what Miss Kearse just

said?

A Yes, I did.

THE COURT: How would that statement affect the figures that you have in the chart AX 294, if at all?

THE WITNESS: Your Honor, it won't affect it at all if it were a settlement with respect to a new negotiation and there were to have an impact in the future.

As I understand the question, this was a settlement in claim of inadequate payments in the past. If that were true, your Honor, then I--

THE COURT: Then you would allocate--

THE WITNESS: You would allocate it back over some reasonable arrangement.

According to this information, it was a settlement in relation to future. Then I don't think it ought to be restricted back.

MISS KEARSE: Let me add one thing, and that is that the settlement involved granting of licenses for the periods starting April 4, 1970 and continuing through September 30, 1976.

THE COURT: Were the payments to be made during the period of this chart?

MISS KEARSE: Yes, your Honor. They are reflected in the interrogatory answer, payments that were

made during 1971--1970, 1971 and 1972.

MR. BAKER: Your Honor, if there is going to be testmony on this subject, I would like to have the witness and some backup documents I could question him on.

THE COURT: I am not taking Miss Kearse's statement at the moment at least as conclusive, but we have to have some assumptions on which to question Mr. Nathan. I want to be sure that he's questioned on that set of assumptions as well as your set of assumptions so when we find out what the facts are--I will say that there is some presumption that Miss Kearse's statement is correct since it comes from an attorney for the party who gave the answers to the interrogatories. It is only a presumption. If you have any need to go behind it, go behind it.

MR. HRUSKA: Let me rise on this point, your Honor, and state it is perfectly obvious that when NBC pays BMI a figure of in excess of $10,000,000 and part of the settlement includes the dismissal against NBC of a claim brought by BMI both on anti-trust and accounting grounds for years prior to 1970, that sum significant portion of that $10,000,000 was NBC's payment to BMI with respect to those prior years.

THE COURT: I am not going to try to decide that question now or try to try a case within a case.

In view of the complex situation in which we call find ourselves with an expert witness whose time we don't want to waste and the judge whose time I don't want to waste, I suggest that we ask Mr. Nathan his opinion on the basis of various hypothetical possibilities and see what his set of principles is in regard to the effect of those hypotheses.

Then we will have to clear up the actualities later or argue them if they are not clear.

Q Mr. Nathan, assuming that after the point in time in which the figures in AX 295 were put together that BMI reached a settlement with ABC and NBC regarding claims for underpayment by those two networks for past years and that this settlement provided for the payment of amounts in the future which were greater than they would have been if there had been no dispute as to past years, if those facts were true, would you draw the same inferences which you previously drew on your direct examination with respect to that chart?

MISS KEARSE: I understand your Honor's ruling perhaps deals with the portion of that question that deals with NBC, but I object to the portion of it that deals with ABC.

There's nothing in the record with respect to ABC and there has been no settlement with ABC with respect to the past.

THE COURT: I didn't understand Mr. Baker to be asking a question with regard to a particular company.

MISS KEARSE: I thought he mentioned ABC.

MR. BAKER: I did mention ABC, your Honor.

THE COURT: I think the question would be relevant whether it was XYZ.

Q If there has been no payment with ABC, you may strike ABC from that question.

I will add another hypothetical.

THE COURT: Take one at a time.

Q They are both related to those figures, and that there is still claims outstanding by BMI against CBS and ABC for the years prior to 1969.

A Well, if I could break the answer down into two parts, sir. I would say first that to the extent that clearly any payment now or any time in the future relates to any past deficiency, and that is clear and unequivocal, agreed upon, I believe that that amount should be distributed back over whatever period it is agreed it applies to to make an adjustment.

Now, you then I believe asked me, would that change by conclusions as drawn from this chart. There I must say that it depends upon the magnitudes because if you will look at Exhibit AX298, we are dealing with figures

in the relative sizable levels, the figures 12 million -- almost 13 million in 1962 and somewhere in the 15 to 18 million level in 1966 to '72.

I find it hard to believe -- I don't know the numbers. I find it hard to believe that an adjustment by BMI spread out over the years would change the contour greatly. If it did, I would come to a different conclusion. If it went up and paralleled the gross advertising revenues I would say that my conclusions were not valid.

Q Mr. Nathan,with respect to the collections of ASCAP from the three television networks, let's begin with CBS.

Are you aware, Mr. Nathan, that CBS -- I believe it is from 1970 on -- has been operated under an interim fee arrangement?

A Yes, sir.

Q And no final term has been made of the amounts due?

A That is correct, sir.

Q In 1970 or '71 there was a lump sum paid by ABC to ASCAP in settlement of disputes over prior years, is that correct?

A That's correct.

Q As I understand it, you allocated that on the

basis of the proportion of distributions of each of the prior years?

A To the period to which that back payment was disbursed or distributed.

Q Are you aware of whether there was a court order entered in U.S. against ASCAP concerning the distribution of the lump sum payment received from ABC specifically on May 28, 1971?

A Time distribution?

Q The allocation of the 4-1/4 million over prior years.

A By years, no, I am not aware of that.

THE COURT: Would that influence your judgment or wouldyou feel -- I am not suggesting an answer, I just want to be sure -- that the economics of the situation should be controlled by the Court decision as to the allocation of those payments?

THE WITNESS: Well, your Honor, it is --

MR. BLUMSTEIN: Your Honor, the Court decision as to allocation related to distributions to ASCAP members, it did not relate to an allocation of the payments from ABC over the years in terms of ASCAP collections.

That was the Zekley case.

THE COURT: I think we all know the decision

we are talking about.

In any event, what I am asking Mr. Nathan, and you can ask him further questions on redirect if you want, is: In the event that a Court should have allocated differently than you did, what would have been your guiding principle if you had known about it or would you have, in any event, allocated as you did?

THE WITNESS: Your Honor, if the allocation over time were undertaken by the Court, I would like to understand why that distribution, and if there were some reason given that made economic sense, I would certainly adopt that.

I must admit I don't know what the basis for the CBS apportionment over the years was. I haven't been able to find out, but we accepted that. It had some variation from the economic apportionment. I think the apportionment made sense, but I would be prepared to accept another allocation if it were presented by the Court or by common agreement and there was some logic to it.

My own feeling, your Honor, frankly is that as I look at these redistributions here, it seems to me quite clear that 1969 is a peak, and almost anything one looks at -- the distribution process was not really totally a rational one as was decided.

I think our method of distribution back was a reasonable one, but there is something in the --

THE COURT: Am I correct in believing that unless that 1969 were leveled out forward, it wouldn't create any difference between the two ends of the line?

THE WITNESS: That is correct. Your Honor, I don't think it would be logical to allocate it forward.

THE COURT: I am not suggesting that it would. I am just saying, unless it were so allocated you would still have the same difference between 100 and 122 or whatever.

THE WITNESS: That is correct. If it were smoothed out back, then you would have just a higher figure coming up in 1964, '5, '6, '7 and '8, and a lower figure in '69.

THE COURT: The same figure in '72?

THE WITNESS: That's correct, '71 and '72 and '70 would be unchanged.

Q I would like to ask you a slightly different question than his Honor did, Mr. Nathan.

Do I understand you to be saying that the method by which the Court had allocated the lump sum payments or the method by which CBS and ASCAP agreed for allocating the lump sum payments which are both approximately the

same, it economically makes as much sense as the other method of allocating payments, namely in proportion to payment in prior years?

A Well, I have no -- I have no evidence of a time apportionment for NBC and ABC. I only have the agreement of CBS and ASCAP, and that is why for ABC and NBC we use this method of apportionment in relation to the previous revenues.

Q Mr. Nathan, if I told you that the Court had ordered the distribution of the CBS lump sum payment in the same proportions as the CBS lump sum payment were apportioned, would it make as much sense to distribute the ABC lump sum payment over the years to which it was allocated by the Court as the method which you used?

MR. BLUMSTEIN: I am lost. Could we have the question back, please?

THE COURT: May I make this suggestion, Mr. Baker and Mr. Hruska and Mr. Blumstein. If we are really interested in getting Mr. Nathan's view as an economist as to how much sense the Court decision makes and whether he would have to handle these figures differently if he would have been guided by that decision, I think we ought to give him a copy of the decision to look at it. It isn't that long. I don't think it would be that difficult

for him to absorb. It would be much easier for him to give an intelligent answer.

I don't know if you want to do it at this moment. If you do, let's take another short break and allow Mr. Nathan to look at that decision and ponder it.

Do we have a copy of it here?

MR. HRUSKA: We may, your Honor.

THE COURT: If you don't and you give me the citation, I will call up to my chambers for it.

MR. HRUSKA: Your Honor, I think we have it clarified now.

Initially, the question presented to Judge Ryan --

THE COURT: Talking now about the non-CBS case?

MR. HRUSKA: That's right. In the US v ASCAP case, a petition was brought by a man named Zekley, who was a member of ASCAP, on behalf of himself and other writers in his position. These writers claimed that ASCAP had not complied with the consent decree in failing to distribute the monies which ASCAP received in 1970 back through prior years, to the writers who would have earned the monies in prior years had they been paid in prior years.

Judge Ryan agreed with ASCAP that such a back allocation was unnecessary.

THE COURT: And the Court of Appeals reversed.

MR. HRUSKA: Yes, and suggested to Judge Ryan -- did not direct but suggested to Judge Ryan that the method of allocation that might be used for these back years was in the same ratio as the CBS-ASCAP settlement had apportioned figures for back years in the dealings between CBS and ASCAP.

There was a negotiated settlement between CBS and ASCAP with respect to back years and that settlement apportioned certain figures in those years and certain ratios.

The Court of Appeals suggested to Judge Ryan that

he follow the ratios and that is what Judge Ryan ended up doing.

THE COURT: Is that your understanding of it, Mr. Topkis?

MR. TOPKIS: I can't swear, your Honor. I just can't remember the details.

THE COURT: Well, do we have some documentation here

MR. BLUMSTEIN: We have a copy of Judge Ryan's order.

THE COURT: Does he refer to the CBS --

MR. BAKER: Yes, sir.

THE COURT: Let me look at the Order to see if it has information which I think would help Mr. Nathan as to what I have in mind.

Perhaps it would be simplest, mechanically, if I saw counsel concerned in the robing room. We will be right back.

(Recess.)

Q Mr. Nathan, do you have item 5 of PS 309, which is the Order of Judge Ryan dated July 12, 1971?

A Yes, I have that.

Q Could you turn to paragraph and read that paragraph, together with the table which is on the following page?

A Paragraph 4 states: "The respective amounts

available for distribution to the publisher members as a group and to the writer members as a group shall each be allocated to the years 1962 through 1969 in the following percentages, which are the respective ratios of (1) the combined CBS and ABC license fees allocated to the particular years as set forth below to (2) the total CBS and ABC payments, exclusive of interest received in 1970 for prior years."

Q And then there follows a table which indicates percentages in one column and years in another.

A That is correct.

Q My question to you is, does it make as much sense to allocate the lump sum payments paid by NBC and ABC to ASCAP in the proportions indicated at the bottom of that paragraph 4?

THE COURT: Does it make as much sense as the method he used?

MR. BAKER: Yes.

A I really cannot answer that because, I'll be very honest, with all due respect I don't understand paragraph 4. It sounds to me that it is a set of ratios that are, therefore, ratios and I must say that I read this paragraph at least a half a dozen times and I cannot figure what the judge meant when he said there that it shall be allocated over these years in the following percentages, which are the ratios, and then I

couldn't find the derivation of where these ratios came from and I must say it is completely confusing.

Now, if I understood this, I could then be in a better position to judge whether this makes more sense than the portion by amounts which we suggested.

Q Mr. Nathan, let me suggest, suppose just for the purposes of this question that what it means is, for example, with respect to ABC, the 4.57 percent of the ABC lump sum payment should be allocated to 1972, etc.

A And this is the agreed upon between ASCAP and ABC settlement?

Q Is what was agreed upon between CBS and ASCAP and it is my understanding --

THE COURT: And Judge Ryan ordered the same method to be used. But the question really isn't how it came about butwhether the proportions look to you as reasonable a method of econimic allocation as the one that you followed.

A I think the one I followed sounds more reasonable but, I must say, your Honor, if I redistributed, and I will be glad to do it, that CBS on the same basis, I don't think it would change the shape of the curve in any significant degree.

THE COURT: Well, that is the ultimate question, of course.

Q I notice on this curve that there is a rather

sharp downward teendency or trend around 1969.

Do you have any judgement as to what caused that sharp downward adjustment or what event occurred around that time which may have caused it?

A Which line are you referring to, if I may ask? The collections or the --

Q The ASCAP and the BMI collections; this point here (indicating).

A Well, what caused it is what caused, I think, the 68 to rise to -- the 69 figure. You see, I think that here we have very real questions as to how that special distribution took place.

For instance, as I understand it, on the NBC, the amount that was indicated for redistribution was a given level but quite a bit, amount was left in the 1969 and if, for instance, all of the special distribution, the settlement had been taken out of 69, you would have had a much smoother curve.

69, in my judgement, is attributable, this bump here (indicating), attributable to a degree of, I don't like the word "arbitrariness," but it was a degree of just placing it in for convenience purposes; it didn't make that much difference and some money was left in there.

For instance, if I may refer to my exhibit AX 294

and look at the third page, one sees there in NBC a level that clearly doesn't really make sense.

You see the NBC column, after the redistribution, the second column, with a certain amount left in 69 by the designations -- well, it's a level of practically around 4,400,000 or over 4,000,000 from 64 through 68 and, suddenly jumps to 5,680,000 in 69 and falls back to, of course, the settlement, then, at 4,400,000.

Now, that hardly is the way things occur in normal events and I think this is attributable to some of these consequences of the way the special distribution in 69 was handled and I think one would be justified in trying to smooth out this curve by taking part of that bump in 69 and distributing it back over the past.

THE COURT: If you did, then the immediate earlier part of the curve would rise, sir, correct?

A Yes, sir.

THE COURT: But it would return, as we said before, to the same ultimate end in 1971 and 72.

A And the conclusions which I have drawn I just can't see would change at all. We would just have a higher curve in the earlier period of 63, 4 and 5, 6, 7 would be higher and 69 would be lower and what we would have is this very serious lag I have indicated has occurred and we see

that on the per capita distribution trend.

Q Mr. Nathan, are you aware that in or around 1969 and 1970 lawsuits were filed by NBC and CBS against ASCAP, raising certain questions under the anti-trust laws of the consent decree?

A Yes, I am aware.

Q Do you think that that litigation had any effect upon the fees which were agreed to, to the extent they have been agreed to?

THE COURT: I don't see how Mr. Nathan's opinion on that would mean anything. Either there is a demonstrable relationship or there is not.

Q Looking at AX 294 again, am I correct that you are comparing gross ASCAP and BMI collections with gross advertising revenues?

A Yes, sir.

Q And do you make any assumptions concerning the amount of music used or the units of advertising carried on the three television networks?

A No, sir.

Q So far as you know, the increase in advertising revenues might have been accounted for by increase in the number of advertising minutes carried on the network?

A Sure; could be.

THE COURT: Does it make any difference in the conclusions you reached as to what the cause of the increases were?

A Your Honor, I would say that if the networks were to deliverately move away from music programming and say, "well, we'll drop songs and put on advertising," that would, of course, then increase the revenues and to the extent in my judgment that useage of music does get involved in the negotiations between the networks and the performance licensing organizations, to that extent there would be an impact, because you would have a downward pressure exerted by the networks for a lower payment for music because less is used and you would have an upward pressure in advertising revenues because they are now advertising instead of playing songs.

THE COURT: That, I take it, would strengthen your view that there is not a cartel controlled situation by the licensing organizations.

A Yes. It would strengthen my views on two respects -- both that there is a real bargaining that takes place and that useage is a factor that gets involved in the bargaining process.

Q Let me make sure I am absolutely clear on this. It is irrelevant to your conclusion the relationship between the volume of music used and the gross advertising revenues;

is that right?

A No. I didn't say that, no.

Q Then you assumed that they stayed approximately the same?

A No. I would say that to the extent that less music was used, to that extent I would have expected the networks would have succeeded in achieving a lower payment for music than otherwise would have been the case.

Q Now, do I understand from your testimony that as a general proposition, it is your view that if the price a consumer pays for a product does not increase pretty much in proportion to his gross income, this demonstrates that the supplied of the product does not have a monopoly power?

Is that a correct generalization of your testimony based on this chart?

A Can I hear that question read back?

THE COURT: Yes. Read it, please.

(Record read.)

A No, it is not.

Q Would you tell me how the facts in this case make that proposition incorrect?

A Well, in this case I am not talking about only the income side from the music writers. I am talking about what the cost is for music to the networks and what I said is

that you have two relationships that derive here:

One is the fact that the networks have paid, as is obvious here and clear from the subsequent chart, they are paying a lesser and lesser proportion of their revenue for music than had been the case, and I said that to the extent that in this bargaining of the music supplied to the music user, if the music supplier really had a cartal status and really had the bargaining capability attributable to ASCAP and BMI, I think that unless there were tremendous reduction uses of music and unless, also, useage was not an element in the negotiations, which I think was one of CBS's contentions, that this whole system is wrong because use and payment are unrelated.

Now, given those circumstances, I think this does significantly reveal that there is no cartel and I don't see that the issue about the consumer and the price he pays has anythning to do with whether or not the supplier has a cartel or a monopoly or anything else.

MR. BAKER: I woud like to ask the clerk to mark ar PS 919 a copy of AX 294 with a slight modification.

(PX 919 marked for identification.)

xxx

Q I would like to show this to you, Mr. Nathan. Do you see the line between ASCAP and BMI collections and gross advertising revenues?

A Yes, sir.

Q Suppose that that line was the plotting of the index of ASCAP and BMI collections from the three television networks.

Would that change your testimony in any way?

A Yes. I think that would -- I would like to see the next three years, too, 70, 71 and 72 but, if this were the line, this would indicate that ASCAP and BMI were able to retain reasonably close relationships to the rise in advertising revenues and hadn't lagged behind nearly as much as my figures indicate.

Q Suppose that were an index only of ASCAP collections. Would that make any difference, other than simply excluding BMI from your conclusion?

A No. I think I would say the same thing -- that it was able to maintain a reasonably close relationship with the advertising revenues and not fall behind as is indicated by my figures for the combined collections.

Q I think that you also testified earlier in words or substance that the chart, AX 294, does not suggest to you that ASCAP and BMI have market power.

Was that correct?

A I don't think I said they don't have market power. I think they do bargain and anybody who bargains with any degree of success has some marketing power but I think it

manifests rather clearly they don't have cartel market power, which is a word that is indicative of very, very substantial monopolistic power.

Q Are there degrees of monopoly power?

A Well, especially when you have oligopolies and not a monopoly.

ASCAP -- I never heard anybody accuse ASCAP of beir being a monopoly. I have heard that ASCAP and BMI is a cartel but when you have more than one operation, unless they absolutely work together as one, when you have an absolute cartel -- otherwise, you do have degrees of difference.

Q Would you agree that the document which has been marked as PX 199 suggests that if these were figures for ASCAP collections from the three television networks it suggests that ASCAP has more market power than, say, ASCAP and BMI combined?

A I couldn't agree with that that -- you know, what is implied here is, you are saying that if a price parallels revenue closely, that reflects a great degree of monompoly and therefore if ASCAP alone were to have this kind of an index, it therefore has more power than ASCAP and BMI together.

This doesn't necessarily follow. It depends on a whole number of factors and I never indicated here that this

difference between the gross advertising revenued line and the BMI-ASCAP collections is a quantitative measure of cartel and monopolistic power.

I said that the pattern here is certainly not indicative of what one would expect from a cartel. They would have done an awful lot better and, now --

Q Isn't the converse of that that the pattern on PX 919 suggests that they would be doing better? I mean, doesn't it suggest at least that they are closer to the pattern of a cartel?

THE COURT: Mr. Nathan already indicated that they are closer, yes, but --

A I must say I am looking at this chart here and you are asking me questions. I am perfectly willing to answer on anything I can.

I am looking at my AX 298 and I can't find any figures that look like that line in between ASCAP and BMI --

Q You won't, on AX 298.

A I don't know where the figures come from, so it's hard for me to judge.

Q Is the line on PX 919 inconsistent with monopoly power?

MR. BLUMSTEIN: Which line?

MR. BAKER: The middle one.

A You see, again it's a relative question. If the middle line were looked upon in comparison with the dashed line as to who has the most power, it looks like two strong forces pretty much offsetting each other, one maintaining a close relationship to the gross revenues -- maintaining gross relationship of revenues for this payment for the service.

If this were ASCAP and if ASCAP really had great monopoly powers from 1962 to 1969, I might expect this curve to shape up even more rapidly, more rapid rise, show a more rapid rise.

Q But the question, sir, is the line on PX 919 inconsistent with --

THE COURT: You mean is it impossible that there would -e a monopoly?

MR. BAKER: With those conditions. He testified that this was inconsistent with it and I am asking if that is inconsistent.

A Not to the same degree, no. A monopoly can maintain a reasonable relationship over time and say this is our optimum but, no, it's not like this in terms of -- this is a totally untenable pattern in describing what a major powerful force would achieve in this period of time.

THE COURT: You are referring to the pattern on AX 294?

A That's correct, sir, and 919 would be somewhat different, the pattern. It would not indicate this kind of a non-cartel performance.

Q Mr. Nathan, have you heard of the United Shoe Machinery Company?

A Yes, sir.

Q Are you aware of the fact that they were adjudged a monopolist in 1953?

A Yes, sir.

MR. BLUMSTEIN: Your Honor, another case we are going to try here?

THE COURT: I thought the judge did a pretty good job there.

MR. BAKER: I think that one has been disposed of.

Q Do you know what happened to the net earnings of United Shoe Machinery after taxes during the last ten years before it was adjudicated to be a monopolist?

A No, sir.

Q If those earnings declined, would you have concluded that that information was inconsistent with the monopoly power?

A I don't think that earnings are either a controlling nor an exclusive criterion and in a sense this is why

in these charts I try to look at a number of factors:

ONe, the relationship between ASCAP and BMI revenues relative to those of the three networks and, also, to see what happened to the real buying power of the gross revenues of ASCAP and BMI and then, also, to see what happened to BMI's members in terms of their income relative to what this -- what I am trying to say is that I don't think that if one boks on the subject of monopoly, one relies upon any single criterion as a determining element, as the determining element.

Q I would like to ask you to examine PX 920, which after you see it I will tell you it is based on the same information as PX 919.

A Could I ask what information 919 is based on?

Q Soon as we get through with this one, sir.

THE COURT: Can't we look at the back of the book, Mr. Baker?

MR. TOPKIS: As a matter of fact, your Honor, with deference, can't we have an end to this kind of cross examination? This business of giving a witness half a story and asking him "doesn't this show something horrible" may be terribly dramatic when you are dealing with a jury but this is not that kind of courtroom and, as a matter of fact, if you took --

THE COURT: Sooner or later, all the facts are going to have to be put before me. However, if Mr. Baker feels that he prefers to question a witness on an objective basis rather than on the basis which specifies that these figures are X or Y, I am willing to allow him to do it.

Obviously, he has to connect it, somehow.

MR. BAKER: These are hypothetical questions and it is a lot easier than my going to the charts and drawing.

THE COURT: It's hypothetical but the question is whether they need to be.

MR. TOPKIS: That's the point. I think Mr. Baker has the figures and I think we do and the only person in the room who doesn't is your Honor.

THE COURT: And maybe Mr. Nathan. I have to have them, however, before this line of questioning can be presented to me as meaningful.

MR. BAKER: Please mark what is AX 299 with a slight modification as PX 920.

xxx (PX 920 marked for identification.)

Q Mr. Nathan, do you see the line which is not too artfully drawn but starts around 1.04?

A Yes, sir.

Q And if this line represented ASCAP collections as a percentage of gross advertising revenues, would that change

your testimony at all concerning AX 299?

MR. BLUMSTEIN: Your Honor, I have one problem with both of these charts that Mr. Baker has been using and that is he cuts off the numbers in 1969. Mr. Nathan testified about a trend through 1972.

I don't know what the basis for that is.

THE COURT: It is very important in my mind, too.

MR. BAKER: The basis for cutting the numbers off in 1969, your Honor, is that with respect to one of the television networks I don't believe that there is a settlement on a final fee after that time and, therefore, one cannot compute final figures for beyond that period.

THE COURT: That's a good argument. Whether I buy it ultimately, I don't know, but go ahead with your questions. I must say, however, that in the long run, obviously, two things will have to happen for this cross examination to have any meaning -- first, the hypothesis will ahve to be proven to be realities and, secondly, apples and apples will have to be compared and not apples and oranges.

We will have to have a period when I will rule on what that is after I hear everybody's views but let's get back to the question.

Q Mr. Nathan, going to AX 299, is the second line which has been drawn on there, the unlabeled one, is that

the pattern of the relationship between ASCAP collections and gross advertising revenues inconsistent with market power?

A It would reveal, for those years, it would reveal a close balancing power between the ASCAP and the networks. They maintained a fairly close relationship over that period.

All other factors being the same, I would say it was a fairly stable power relationship or stable bargaining capability.

Q But is it inconsistent? Does that suggest that ASCAP's position is inconsistent, it's market position is inconsistent with the possession of market power?

THE COURT: Well, market power --

MR. BAKER: Power over price as defined -- power to raise prices above a competitive level.

THE COURT: You mean unilateral power to do that?

MR. BAKER: Yes.

A I don't know. It seems to me you are asking me -- I'm sorry -- is market power inconsistent with market power. Are you -- you are asking whether the maintenance of an almost flat relationship between the price paid for music and the revenues of the networks indicates that ASCAP has great bargaining power? As I said, it looks to me like the networks and ASCAP, if this were the fact, are pretty much engaged in

a standoff with ASCAP just a little less strong in the latter part of the period than in the beginning.

Q Maybe I misunderstood your earlier testimony but I thought that your earlier testimony indicated that this chart, AX 299, and the relationship which it sets forth, was inconsistent with the proposition that ASCAP was some kind of or that ASCAP and BMI were some kind of supercartel.

A That's correct. I said that if ASCAP and BMI were such a cartel -- I never said they were but I said if they were -- I don't believe this trend line would have occurred.

Now, if ASCAP were a cartel, and I don't consent or acquiesce in that, I am not saying that this curve line would prove that it is not.

THE COURT: You are not saying that it would prove that it is not.

A That's correct.

THE COURT: In other words, you do have a reaction that that aspect of this new line, the one on your own --

A But I still would like to see the balance of it. We used 1970, 71 and 72, sir, knowing that it was an interim arrangement but I must also say we also know that the consent provides for, the consent, the final consent judgment, provides for fairness among the networks and when I look at what

has happened to NBC, I can't conceive of a level of settlement with CBS that is going to change the level of the trend that we had in 70, 71 and 72.

THE COURT: Would you assume, Mr. Nathan, that even though the rates for the last three years are provisional, that neither one of the parties would have accepted those rates if they were totally unsatisfactory?

In other words, that they may at least approximate actual rates or what the parties believed was the value of the product in question.

A Well, I don't know what their -- I think there would have been appeals and appeals and appeals and trying to get the rates changed if they were arbitrary, capricious and ASCAP felt they were capriciously low and arbitrarily low --

THE COURT: We are talking, are we not, about BMI and CBS only?

MR. BAKER: On which? On the chart which I gave your Honor, PX --

THE COURT: On unfixed rates for the years 70, 71 and 72.

MR. BAKER: We are talking about CBS --

THE COURT: And BMI.

MR. BAKER: For payments to ASCAP and with respect

to payments to BMI, I think 71-72 are years which future payments -- I frankly don't know what the relationship is there but --

THE COURT: I am confused about the provisional nature of the payments of CBS to ASCAP in the years 1970, 71 and 72.

MR. BAKER: It's subject to an interim order, your Honor; subject to readjustment at a later time.

THE COURT: In this lawsuit?

MR. BAKER: No. In US versus ASCAP.

THE COURT: I didn't realize that that was flexible still.

That's all of record, for whatever effect it has.

THE COURT: Mr. Hruska, do you know if CBS in its reports to its stockholders have any footnotes about contingent liabilities for fees to ASCAP and BMI?

MR. HRUSKA: I do not.

MR. TOPKIS: The answer is they are not material.

Q Mr. Nathan--I did promise to tell you where those numbers came from, didn't I?

A Yes.

Q Those numbers are the three network payments to ASCAP for the years 1960 through 1969 allocating the lump sum figures on the basis of the ratio set out in Judge Ryan's order which we discussed earlier.

A What you did is redistribute the NBC and ABC by the ratios in Judge Ryan's orders rather than the way we did it?

Q That's right.

This is AX 300, I believe. And I believe that you said that this chart and the other two showed that the earnings of ASCAP members on the average did not increase as rapidly as the individuals in the other sector of the economy which are indicated there?

A That's correct.

Q Am I also correct in assuming that the average ASCAP distribution, those are the distributions from all

ASCAP licensees?

And not just the television networks?

A Yes, this is the distribution of all the licensees.

Q Do you know whether the lump sum payments made by the networks were factored in over past years in computing those averages?

A Yes, they were. They were redistributed back.

Q And were those lump sum payments redistributed back in the same manner in which they were distributed -- the chart on page 3 of AX 294?

A They were--well, the court decision, they were not all the same as that, no. The distribution by--of the NBC was distributed in the year in which it was received, namely, in 1969.

That was not factored back and for CBS and ASCAP, according to that decision that we have referred to, item 5, that was factored back and not only were the amounts factored back but the ASCAP statistical tabulations redistributed the curve so that when the increase in income is shown in the material from Mr. Fagan resulted in people slightly under 5,000 going above 5,000. That was also included and the people just below 10,000 were pushed above 10,000. That was included. So that for CBS and ABC that was all factored back.

Q Is it relevant to your analysis of what those charts show, the total number of ASCAP members among whom the ASCAP revenues were distributed?

A Yes. As a matter of fact, the numbers were important and that is why I didn't want to confine our analysis to AX 300 because AX 300 could be influenced by, oh, assuming there were very wide fluctuations of membership in and out, a person came in with one song and that was the end of him and then he dropped out and didn't pay his dues and this kind of a variation of membership factor would manifest itself in this chart AX 300, which shows the average for anybody receiving any income and that's why I think that AX 310 and AX 311 are equally or more significant because there you are not dealing with these numbers that are subject to factors other than, say, shifting to BMI, but you don't have this sort of unreasoned or irrational or not explainable change in membership.

Q Could we focus a little bit on the comparability of the various lines there.

I take it that the average weekly earnings of private--of workers in private non-agricultural industries, includes probably most of their income, isn't that correct?

A Oh, sure. Most of the nono-supervisory workers are not very affluent in dividends and interest income and

entrepreneurial income.

Q The same would be true of most of the people in the category motion picture film and distribution?

A Yes.

Q And would you expect a high degree of unionization among these employees?

A It varies but certainly it is fairly high. We have about 17,000,000 members in this country with non-agricultural and non-entrepreneurial labor force, non-Government--well, some Government unions, in the vicinity of probably 60,000,000.

It is a sizeable union membership, yes.

Q Do you think it is appropriate to compare a group of people whose economic bargaining position is exempt from the anti-trust laws with others whose position is not exempt from the anti-trust laws?

A Well, I think it is especially fair to do it when those who are not exempt from the anti-trust laws have been accused of having cartel powers and what wielding this tremendous muscle and I think that it is fair to draw that comparison.

Again, Mr. Baker, I am not going to appear to be here to say there is a one to one relationship.

The purpose here is to mainly show some comparisons

and again, I draw a conclusion that what they show is hardly the muscle that goes with a muscle bound person compared to a weak person.

Q Now, the average which was computed in the bottom line, you are aware that a good many ASCAP writers receive distributions under the Four Fund System?

A Yes, sir.

Q And that some of them may not receive quite as much today as they might have received if they had been on a current performance basis?

A That's correct.

Q And therefore, some deferred compensation is not included in those figures, is that correct?

MR. BLUMSTEIN: I object to the form of the question.

THE COURT: Maybe I don't understand your argument but whatever effect the Four Funds has vis-a-vis the current performance fund, wouldn't it have roughly the same effect all the way through the period?

THE WITNESS: It would tend to. You can have some differences but--

THE COURT: We know of nothing in the evidence that suggests that.

MR. BAKER: I think one thing does and that is the

tremendous growth in the number of writers among who this ASCAP pie was divided.

It would suggest that there were more people who were going up than there were going down, which I think would result in a shift backwards.

THE WITNESS: Could I answer on two scores. One is, I don't know of any reason why of the changeover a time but the second thing is, as I understand the Four Funds, and I think I understand that there is no deferred compensation.

Nobody is saying anything. The Four Funds redistributes presently.

It is in a sense like the way sort of a Social Security System really functions or any saving system functions. If I save today, I am not putting into a barn or a silo something that I am going to take back out.

I am abstaining from consumption and the people who are retired are eating what I am producing. When I retire 15 years from now or ten, I don't expect to eat what I piled up. I am expecting, then, to consume out of current production.

What you got here is, you got a redistribution in the ASCAP membership from those on the up who would get more from current distribution--from current credits, they are getting less and those who get because of qualification and

duration and the like, they are getting more and are redistributing among themselves. It is not a deferment.

Q I am going to try and wrap this up as quickly as I can, sir. Is it relevant to the conclusions which you draw from this chart the fact that the personal income, gross personal income in the United States was only divided among 11 per cent more people in 1972 than it was in 1962 whereas the ASCAP writer distributions were divided among 96 more people in 1972 than in 1962?

A I think that's relevant but I don't think that if we take the other two charts and take it over 5,000 or over 10,000, you have that kind of increase in numbers, I don't have the figures readily handy--

Q I will have them for you in just a moment, sir. Basically doesn't what this chart show is that the ASCAP writer distributions are being divided among a lot more people, almost twice as many?

A The total number that are getting money is increased but the total of our labor force is increasing. The total population growth has slowed down.

Q But not 96 per cent over ten years?

A No. I don't know about the motion picture industry but, you know, productivity and income and wages and the like are not unrelated to numbers. You have two factors that affect production.

One factor is the number of people and the other factor is the rate and what we have here especially with the, at least with the motion picture film and distribution and with the non-agricultural private industries are the rates and not aggregate.

Q Mr. Nathan, would it be a fair inference from this chart--

THE COURT: What is the number?

THE WITNESS: AX 311.

Q That the ASCAP members receiving over $10,000 a year in distributions pretty much held their own during 1969? In comparison to weekly earnings private non-agricultural industries and average weekly earnings motion picture--

A Yes, they maintained themselves--well, it is really through '68 that again that '69 has a problem of distribution but, let's say they held on reasonably well through '69.

THE COURT: I can see they held on pretty well with regard to the non-agricultural workers in 1968 where the lines cross and to the motion picture workers through about 1967 where the lines cross but, for example, between '67 and '68 there seems to be a noticeable change in the relationship between the ASCAP, I guess I should have said--let me start again.

In 19--the middle of 1966 the ASCAP consideration

crosses the per capita personal income line, does it not?

MR. WITNESS: Yes, sir.

THE COURT: By 1968 there is a noticeable spread there, is there not?

THE WITNESS: Yes, sir.

THE COURT: I just wanted to be sure I am reading this thing right.

Q Mr. Nathan, in comparing the average ASCAP distribution to writers receiving $10,000 or more with per capita personal income total economy, of what significance is it to you in accounting for the differences there that between 1962 and 1969 the population increased 8.6 per cent and the number of writer members receiving over $10,000 increased 41 per cent?

A From '62 to '69?

Q Yes.

A Well, the implication of what you are raising is that you have a certain amount of music income to divide and I don't buy that. I don't think any economist buys it. There is a given level of income for a group. This was the old technocratic idea that there is a certain level of production in so many workers and you have to divide it up and if you are going to have shorter weeks and the like.

After all, music production and music yield is not unrelated to what the people turn out and if you have -- I was trying to figure these numbers here, the numbers that get over 10,000 are really quite small, just very few hundred. I am just subtracting 1962, it is only 300 --

Q 368 to 521. 368 for 1962 and 521 for 1969?

A It looks -- well, I have the unadjusted figures here. The adjusted are a little bit different, yes. But that is a small number, but the question one has to raise, of course, is what these people produced in terms of music and --

Q Do we know that?

A It isn't that the same production occurred in music in '69 and '62 and therefore you divided by 500 people instead of 300 people and therefore the per capita is

that meaningful.

I think, your Honor, that the comparison of the ASCAP distribution to the workers has somewhat more validity because you do have age distribution problems. You see, one of the things that has given us a very sharp rise in per capita personal income has been, of course, the slow-down in the birth rate and, therefore, we have a smaller proportion of people under 18 or under 21, namely, non-workers and a higher proportion of people in the working category, so that your rise in income per total population rises a little bit faster than your rise of those in the labor force.

But when you look at this chart, when you take into account that difference between per capita personal income and whether you look at the other two, it is very, very clear that ASCAP shows no manifestation of great cartel power.

Q Would it be appropriate in considering because of the divergence in the growth rate of the number of people involved to consider the fees which ASCAP receives from the three television networks and compare those indices with the indices set forth on AX300, 310 and 311, I believe it is.

A No, I don't think -- now it seems to me you are reversing yourself and you are saying why don't we take out of AX294 the total collections of ASCAP-BMI, and compare them with a per capita. No, I think that then one ignores what the contributions are. What I could conceive of an industry in which you have a drop in number of workers. It is a declining industry. But in which those that are surviving are doing very well, but the industry as a total will show a very major decline. Take the coal industry. For a long period of time you had a very, very rapid rise in per capita income among the coal miners, but a very sharp drop relative to the total economy because coal was going out of style.

This was before we woke up to our energy problem. But I don't think it would be logical if you are implying that we ought now to take the total revenues of ASCAP and BMI and comepare them to per capita personal income or to average earnings in other industries because it depends on how many participants there are. If there are a lot more music writers, really writing and getting out more production, I think the per capita becomes very important.

Q You think that a factor in determining the price which ASCAP charges to the CBS network or which is negotiated between them, one of the factors involved there is a number

of writer members who are receiving distributions from ASCAP?

THE COURT: Are you asking whether Mr. Nathan thinks that is so?

MR. BAKER: Yes.

A I would say not the total number but I do think that above certain levels it is significant. I think that if I were bargaining for ASCAP with CBS or CTN and the other networks and I knew that my members on a per capita income basis were lagging behind, I would bargain pretty hard feeling that there is a disadvantage there and, of course, to the extent that CBS would come around and say yes, but we are not using your music and we are just paying you, I would say fine, that is part of the bargaining process.

Q You believe it would be a relevant factor for ASCAP to come in and say, let's say all of the things being equal, that CBS, you are going to use the same amount of music next year which you are using this year, but we have the impression that you are going to diversify your putting on some new type of programs, you are going to be using different writers' music and therefore we think you ought to pay more?

MR. BLUMSTEIN: Objection.

THE COURT: I don't think Mr. Nathan is required to rationalize a hypothesis that is so complicated. I would like to ask, and I would be glad to have the views of the parties or evidence on this point. Dr. Fisher is going to be testifying again so he can answer this question as well. The extent to which you consider it a relevant factor in the bargaining between ASCAP and CBS that ASCAP when its membership grows presumably makes available to CBS a larger repertoire from which to choose than it would if it had a smaller membership.

THE WITNESS: I certainly think this is a factor. I know of no bargaining, your Honor, where any one single factor dominates.

I think --

THE COURT: I am not suggesting it dominates. Do you consider that a relevant factor?

THE WITNESS: I think, your Honor, to the extent that there are more writers of music and therefore there is a larger --

THE COURT: When you have a blanket license?

THE WITNESS: When you have a blanket license, when you have more writers and when you have a larger repertoi that becomes a bargaining factor just as the amount that is used by the networks in my judgment is also a bargaining

factor.

THE COURT: Or the limit of the amount?

THE WITNESS: The limit of the amount. The magnitude up or down.

MR. BAKER: May I have just a moment, your Honor.

Q Mr. Nathan, is there any way to tell from that chart --

THE COURT: 311.

Q 311, the extent to which the decline in ASCAP average distributions to writers receiving $10,000 or more, the extent to which that decline differs from the other indices on the chart, is there any way to tell the extent to which that is attributable to growth in the number of writer members more rapidly than the growth of thenumber of people in those other lines of endeavor?

THE COURT: I am a little confused by your question, Mr.Baker, because it wouldn't seem to me that the dropoff here inrelation to itself would be affected by the relationship between what happened in ASCAP and what happened in the population of the workers groups or were you asking a basic relationship question to begin with?

MR. BAKER: Basically what it seems to me, your Honor, there is an attempt here to compare two rather disparate types of indices.

THE COURT: I understand your approach to this and I understand really what I think you are asking Mr. Nathan.

May I see if this is right: Mr. Nathan, your chart shows dropoff for ASCAP and a rise for everyone of the other lines, at least a dropoff after a certain point for ASCAP?

THE WITNESS: Yes, sir.

THE COURT: Is there any way of your determining the extent to which what your chart shows is influenced by the fact that the membership -- that the increase in membership of ASCAP for the period involved was at a significantly higher rate than the increase in the population or membership of these other groups shown?

MR. BAKER: Thank you, your Honor.

THE WITNESS: We must remember there are two factors here at work. One factor is number of members active and the other is the shift of membership.

You see, as the total level changed we have a larger number of members who are now above 10,000 than we had before. Larger number because the total level of payments have risen.

What we would have preferred doing, your Honor,

was to have an identical sample. This is difficult because of the variability of writers moving up and down, but we would like to have tabulated an identical sample over ten years, in other words, taken the number of people who ten years ago got $10,000 and traced each one who stayed in.

Not changing number to number. I am convinced, your Honor, that by bringing in shifting the upper, I think that the trender is higher than it otherwise would have been. This is a matter of judgment. In other words, in my judgment I think this curve would have been even flatter if we would have had an identical sample, because what we have had is, you don't just have people who are making 9000 move into ten.

But you have people making 90 moving into 120, or 50 moving into 70, as the total level of activity rises, but we did not have an identical sample. It would have been a very difficult job because you would have to go back into the files personally, you had to take out people who died, of course, you could have done this by chain linking, taking two successive years and taking one year those that are above 10,000, their average, and the same people next year, and then dropping and then in the next two years you have one who is living the first year and dead the second year, you eliminate them in both years, but it would

have been quite a difficult task. But in a sense you have the same thing in your private industry.

I was recently talking about wage and productivity measures in an industry and they said, we upgrade people. We keep upgrading people and that is where our wages come, wage increases partly along with negotiating with the union. I said why don't you try to find out how much you really upgrade results in your higher wages.

The next time I came back to them they said, forget about it, because what happens in addition to the upgrading of those we have, we hire at lower levels so there is an offset so they dropped that whole argument because it would have been disadvantageous.

And in a sense this happens here. And it happens in all these other industries too, so I don't think there is a distinct factor --

THE COURT: You don't think the situation is distorted by the point that Mr. Baker raises?

THE WITNESS: No.

THE COURT: Gentlemen, how much longer do you think we are going to be. I, of course, would like to accommodate Mr. Nathan if he is not required tomorrow, but I would like to finish up as soon as we can.

MR. BAKER: Five minutes.

THE COURT: Good.

Q I must admit, Mr. Nathan, I have forgotten what you indicated the significance of this chart was, that is AX 312.

A I just said on AX 312--all I said was that in the last three years the purchasing power of the total income of ASCAP was less than it was ten years ago.

In other words, I was just showing what happened to their total collections, and then took a look at it against the consumer price index and said that the buying power is less.

THE COURT: In your opinion, that is not a statement which is subject to interpretation? I take it this is a mathematical demonstration?

THE WITNESS: Yes. I think it reflects further not in a precise concrete overwhelming may a lack of--

THE COURT: What's to be made of the fact is another proposition. I believe I'm correct that what you have done is take some numbers to relate them to some other numbers.

THE WITNESS: That is correct. I think there is significance in terms of bargaining power. I am not trying to draw precise conclusions.

MR. BAKER: I would like to ask the clerk to mark a copy of what was formerly AX 312 with a new line added to it as PX 922.

xx (PX 922 marked for identification.)

Q You may recognize the curve of this line, it is the same figures we were dealing with earlier, Mr. Nathan.

A Yes, sir.

Q Doesn't this new line on here--these are the ASCAP collections from three television networks computed on the basis I indicated earlier in the record--suggest to you that perhaps ASCAP at least through 1969 did considerably better than the consumer price index?

A Yes. On my chart I showed that ASCAP did better and this shows--this shows that it did even better by your method of distribution through '69.

Q I believe your chart shows that ASCAP collections went up 43 per cent, the line which has been drawn on PX 922 indicates that it has gone up 165 per cent roughly by 1969.

A Go up 65 per cent.

Q 65 per cent, I am sorry.

A Yes, sir.

Q Do you believe that it is more appropriate to compare ASCAP collections to the consumer price index or to the wholesale price index?

A Well, for the purpose I was trying to show as to what the implications are to the membership, I think the consumer price index is more realistic.

Q What about what the implications are to the purchaser of music?

A I think to the purchaser, if I were looking at ASCAP as a--I mean, CBS, CTN and looking at my revenues and my expenditures, I would think of the wholesale prices, too, as a buying of a service.

I think one--it is relative to what one is looking at. The consumer price index I think more accurately reflects not only costs to consumers, but I do also think it more accurately reflects service industry prices than wholesale price index.

The wholesale price index is very, very, very lightly weighted by services.

The wholesale price index is primarily weighted by commodities like agricultural commodities, steel, cooper, zinc, aluminum, things of this nature.

7B

gab-1 Nathan-cross

I would have to look at the composition and the movements of it.

I think the wholesale price index which it lagged way behind until about 1971 was not a very godo reflecter of the cost of services.

MR. BAKER: Your Honor, I would like to conclude with a request that the charts be available in court Friday.

I think there may be another witness who may have something to say about them.

THE COURT: Any further questions?

MR. BLUMSTEIN: I have no further questions.

THE COURT: All right. Thank you very much, sir.

(Witness excused.)

MR. BAKER: I would also like to offer the charts which I had marked in the course of this cross-examination subject, of course, to providing everybody with the tables which are presently written in pencil which back those charts up.

THE COURT: Decision is reserved on that. I think it is a reasonable proposal. We are adjourned until tomorrow at ten o'clock.

(Adjourned to Thursday, December 13, 1973 at 10:00 A.M.)

December 12, 1973

4428	24	of otherwise	of his otherwise
4428	24	theproblem	the problem
4428	24	Hruska	Nathan
4430	4	inthis	in this
4430	9	performance	per-performance
4431	13	use	uses
4433	10	fact.	fact?
4433	11	That is	That´s
4434	17	infringement	infringing
4435	5	evidence	evident

4436	3	4416	4416
4436	9	rise."	rise?"
4436	21	change	changes
4436a	3	the direct licensing	direct licensing
4437	4	all even	all, even
4438	3	limiting hundreds	limiting the hundreds
4438	9	orchestry	orchestra
4438	18	in practicable	impracticable
4441	4	program	per-program
4441	16	serted	certed
4441	22	bundels	bundles
4443	11	thse	these
4443	20	He	he
4444	6	free music	music free
4444	11	pay	paid
4446	12	Mr.Wright	Mr. Wright
4446	13	marginal song	song
4446	13	no cost	no marginal cost
4449	9	work	works
4449	14	repetoir.	repertoire.
4450	8	inmy	in my
4450	11	do.	deal.
4450	24	his	its
4451	3	ina	in a
4451	14		no ¶

4451	24	m e.	me.
4453	5	Its	It's
4453	6	pool use	use pool
4454	5	Mr.Brettler's	Mr. Brettler's
4454	18	Mr.Brettler	Mr. Brettler
4455	3	Mr.Brettler's	Mr. Brettler's
4455	5	canceled	cancelled
4455	22	to	would
4455	17	10producers	10 producers
4456	19	become	becomes
4456	21	probably	probable
4457	23	cases	case
4458	3	day	Day
4458	23	With half	We have
4458	25	ASCAP.	ASCAP?
4459	7	self-annilation	self-annihilation
4459	10	others	others'
4459	20	including	concluding
4459	23	include	conclude
4462	13	paralle	parallel
4463	14	hirer	hire
4465	3	ASCAP	use of ASCAP music
4466	4	records	record
4466	20	inner quality	inequality
4467	2	meant	mean

4467	20	instead on	instead of on
4467	20	said.	said?
4468	5	to do	due to
4470	6	e conomic	economic
4470	24	networks	networks'
4472	6	inlife	in life
4472	7	many	and in many
4472	13	a direct	direct
4473	22	notto	not to
4474	7	very	a very
4474	10	term	notice
4475	24	professer	professor
4476	9	convenient	convenience
4476	19	questionabout	question about
4476	20	proper situation	proposition
4477	7	convenience	inconvenience
4478	9	in the	in
4478	13	Dr.Steiner	Dr. Steiner
4479	8	producers	producers'
4480	22	use	uses
4481	5	procured.	procured?
4483	9	je	me
4484	3	has	have
4484	22	omething	something
4486	8	comulative	cumulative
4487	15	anymore	any more

4487	23	tuna fish music	Tuna Fish Music
4488	10	So	THE COURT:
4488	11	our	your
4488	18	Beame	Dean
4489	11	not.	not?
4491	21	stations.	stations?
4492	9	brief	briefs
4492	16	years.	years?
4494	6	There's	There've
4496	2	from . . . corporation	from, at least it seems to me, from a corporation
4502	7	L51	151
4503	2	particularly	particular
4503	3	fixing	rate-fixing
4503	3	on has	on, has
4505	5	odds	orders
4505	6	rat-fixing	rate-fixing
4505	7	is there.	are there.
4506	22	1 9	159
4507	6	a	an
4507	17	sy ndication	syndication
4507	23	great	a great
4508	13	th it	this Court, it
4508	14	evidence, o	evidence, there was no
4508	15	oppor	opportunity

4509	4	with.	with?
4509	17	FCC attempted	FCC-attempted
4510	9	cBS	CBS
4512	10	youwill	you will
4513	3	procedure.	procedure?
4513	20	readfully	dreadfully
4514	23	inconcistence	inconsistency
4515	5	"T"	"the"
4516	22	being	binding
4519	16	(Exhi bit	(Exhibit
4520	11	what	somewhat
4520	12	licensing.	licensing situation.
4521	5	answer	answers
4521	5	is	(delete)
4522	3	Honor.	Honor?
	9	endeaver	endeavor
4523	6	ABC the	ABC, the
4523	12	illusions	allusions
4524	2	indispensible	indispensable
4524	3	Again	THE COURT: Again
4527	6	revenues, "1962-72,	revenues, 1962-72",
4530	8	of	to
4530	8	to	of

4531	1	4526	Delete
4531	2	understand	understood
4532	1	4527	Delete
4532	11	again	again an
4532	18	Rufushouse	Rufus Hughes
4532	22	Rufushouse	Rufus Hughes
4533	1	4528	Delete
4533	16	raw	raw data
4534	1	4529	Delete
4534	5	develop	developed
4535	16	isincluded	is included
4537	11	settlemnt	settlement
4538	19	cartel	cartels
4538	25	observed	observe
4539	3	'71 and '71	'71 and '72
4539	12	or	or a
4539	18,21	useage	usage
4539	19	as	a
4540	9	WITNESS"	WITNESS:
4541	9	television from	television revenue from
4541	14	redeived	received
4541	21	in the	of an
4542	6	1972 and 1972	1971 and 1972
4543	25	inmotion	in motion
4544	5	retailestablish-ments	retail establishments

4545	10	5000	$5,000
4546	13	or	of
4546	16	other	others
4546	21	An d	And
4547	10	metake	me take
4547	18	the economic report	The Economic Report
4547	19	president	President
4547	20	ann ally.	annually.
4548	16	STatistics	Statistics
4548	23	320and	320 and
4548	23	STatistics.	Statistics.
4550	14	5000...10,000	$5,000...$10,000
4551	9	totaled	total
4551	9	eachcategory	each category
4552	16	recipients	recipients'
4553	22	account is	account, is
4553	24,25	society	Society
4554	4	AX 12	AX 312
4554	18	consummer	consumer
4556	8	back up	backup
4557	7	useage	usage
4559	3	indeses	indices
4559	16	actions	action
4559	17	past.	the past.
4560	8	there	that

4560	17	restricted	redistributed
4561	21	3um	some
4562	2	call	all
4563	23	by	my
4564	2	relative	relatively
4564	15	operated	operating
4564	18	term	determination
4565	11	4-1/4	4 1/4
4565	15	wouldyou	would you
4568	7	use	used
4571	20	PS 309	PX 309
4571	23	paragraph and	paragraph 4 and
4572	20	honest,with	honest, with
4573	17	butwhether	but whether
4573	18	econimic	economic
4574	2	teendency	tendency
4576	5	anti-trust	antitrust
4576	5	of	and
4577	3	cause	causes
4577	4	deliverately	deliberately
4577	9,21	useage	usage
4578	14	supplied	supplier
4579	3	cartal	cartel
4579	10	reduction uses	reduction in uses
4579	11	useage	usage

4579	18	anythning	anything
4579	21	PS 919	PX 919
4580	9	woud	would
4581	8	of bein	of
4581	20	monompoly	monopoly
4582	2	revenued	revenues
4583	9	powers	power
4583	10	more rapid rise,	(delete)
4583	15	would -e	would be
4584	11	Honor, another	Honor, is this another
4585	3	ONe	One
4587	18	hypothesis	hypotheses
4587	19	ahve	have
4588	2	the pattern	pattern
4588	12	it's	its
4592	10	network	networks'
4592	14	ABC	ABC payments
4592	21	sector	sectors
4594	4	nono-supervisory	non-supervisory
4595	9	members	union members
		with non-	with a non-
4595	20	what	(delete)
4597	2	who	whom
4597	8	why of the	why it would
4597	8	changeover a time	change over time,
4597	10	that there	that, there

4613- 11

4597	11	saying	saving
4598	10	96 more	96% more
4599	16	that again	that - again
4599	16	distribution	distribution -
4600	3	MR.	THE
4603	6	of an	of in an
4603	6	What	That,
4603	8	industry. But in	industry, but one in
4603	18	comepare	compare
4603	25	a	the
4604	18	of the	other
4604	21	diversity your	diversity, you're
4605	5	point. Dr.	point -- Dr.
4605	7	weil. The	well --, the
4606	15	thenumber	the number
4606	19	inrelation	in relation
4607	6	shows dropoff	shows a dropoff
4608	9	trender	trend here
4609	10	forge	forget
4609	21	COURT:Gentlemen,	COURT: Gentlemen,
4609	22	be.	be?
4610	16	may	way
4612	11	than wholesale	than the wholesale
4612	16	cooper	copper
4613	5	godo	good

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